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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1127

W.J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *Petitioner,*

v.

ERNEST BENJAMIN SMITH, *Respondent.*

On Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

BRIEF FOR RESPONDENT

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On Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 602 F.2d 694 and appears as Appendix A to the certiorari petition. The opinion of the United States District Court for the Northern District of Texas is reported at 445 F.Supp. 647 and appears at A. 124.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

The judgment of the court of appeals was rendered on September 13, 1979. Rehearing en banc was denied on October 22, 1979. A timely certiorari petition was filed, and on March 17, 1980, this Court granted certiorari. _____ U.S. _____, 48 U.S.L.W. 3602.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and the following statutes of the State of Texas:

Tex. Code Crim. Pro. Art. 37.071. Procedure in capital case.

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Former Texas Penal Code, Article 1257(a)-(c). Punishment for murder.[1]

(a) Except as provided in Subsection (b) of this Article, the punishment for murder

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[1] Article 1257, under which respondent was prosecuted, was superseded by Section 19.03 of the new Texas Penal Code, Acts 1973, 63rd Leg., Ch. 399, eff. January 1, 1974. "Section 19.03 of the new Penal Code is substantially similar to Article 1257 of the old code." *Jurek* v. *State*, 522 S.W.2d 934, 936-937 n.1 (Tex. Crim. App. 1975).

shall be confinement in the penitentiary for life or for any term of years not less than two.

(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:

(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;

(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(4) the person committed the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article or of any other lesser included offense.

QUESTIONS PRESENTED

1. Whether the prosecution's deliberate use of Doctor Grigson as a surprise witness at the penalty trial in this capital case deprived respondent of due process of law and resulted in the imposition of cruel and unusual punishment.

2. Whether the Fifth and Sixth Amendment rights recognized by the court of appeals are inappropriate within the context of the capital sentencing trial conducted in this case, where the State had the burden of proving respondent's alleged probable future dangerousness as the basis for a death sentence yet sought to meet that burden through respondent's own statements.

3. Whether the court of appeals correctly affirmed the district court's decision to grant habeas corpus relief based upon the state trial record and affidavits submitted by both sides, since the record and affidavits did not reveal any material dispute of fact necessitating an evidentiary hearing.

STATEMENT OF THE CASE

We regret that due to substantial distortions, inaccuracies and omissions in petitioner's statement, we are constrained to set forth a full statement of the case on behalf of respondent. See Rule 40.3.

A. Proceedings In The State Courts

1. The Guilt Trial

Respondent Ernest Benjamin Smith, Jr., a black American, was convicted and sentenced to die as a result of a convenience store robbery in Dallas, Texas, in which the clerk of the store was shot. The victim was killed by one Howie Ray Robinson, with whom respondent participated in the robbery; Mr. Smith himself did not fire a shot. S/F 2532, 2597.[2]

During the robbery respondent was in possession of a defective .32 caliber automatic pistol which he knew was incapable of being fired. S/F 2590-91, 2594, 2770-73. Robinson had a .22 caliber gun supplied by a third participant, George Holden, S/F 2528, 2534, 2595, who remained outside in a getaway car, S/F 2529, 2533. After waiting for two customers to leave the store, S/F 2530, 2595, 2617, Robinson picked out some lunch meat and a jar of mustard and placed them on the clerk's counter, S/F 2530.[3] Respondent and Robinson then

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[2] Numbers preceded by "S/F" refer to pages of the Statement of Facts before the Texas Court of Criminal Appeals.

[3] Robinson's fingerprints were subsequently found on these items. S/F 2476-78, 2560.

pulled the guns and announced a hold-up to the clerk behind the counter. *Ibid.*

At this moment, the clerk suddenly reached for something behind his jacket in the middle of his back. S/F 2530, 2596, 2618-19, 2624. (The clerk carried a gun when working, S/F 2450-51, and had access to a second gun, a .38 caliber Smith and Wesson, normally kept under the counter by a co-worker, S/F 2444, 2450, 2457, 2459-60.) Respondent, believing that the clerk might be reaching for a pistol, S/F 2596, 2619, 2624, called out to Robinson. The State's evidence is in conflict as to Mr. Smith's exact words. At the penalty trial Dr. James P. Grigson quoted him as having recalled saying "Watch out, Howie. He's got a gun" or words to that effect. S/F 2808.[4] At the guilt trial police officer C.E. Lewis, who obtained an oral confession from respondent at the Dallas County Jail, testified that respondent recalled saying "Get him, Howie." S/F 2530.[5]

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[4] Respondent himself testified that these were his words. S/F 2596, 2600, 2601.

[5] Officer Lewis visited respondent at the jail on October 25, 1973, S/F 2500, two weeks after respondent was arrested, S/F 2564-65. The ostensible reason for this visit was that Officer Lewis was seeking to recover the .38 caliber gun customarily kept in the store, which was missing. S/F 2504-05, 2442, 2444. On the same day that this interview took place, counsel was appointed for respondent. See transcript on appeal to the Texas Court of Criminal Appeals (hereinafter "Tr.") at 5.

Officer Lewis testified that he warned respondent of his rights, S/F 2503-04, and proceeded to obtain the oral confession. Respondent's motion to suppress was denied. S/F 2517-19, Tr. 74-75.

No written confession was introduced in this case, and there is no evidence that Officer Lewis ever prepared one for Mr. Smith's signature.

The evidence is also in conflict as to whether respondent at this time unsuccessfully attempted to fire his defective gun at the clerk. S/F 2530, 2620-21, 2808. There is, however, no evidence that respondent actually fired a shot, and no dispute that the clerk was killed by a .22 caliber pistol fired by Howie Ray Robinson. S/F 2532, 2534, 2574, 2582.[6] The Dallas District Attorney's office has consistently prosecuted Robinson as the triggerman in this homicide. See *Robinson* v. *State,* 550 S.W.2d 54 (Tex. Crim. App. 1977).[7] And at every stage

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[6] See also S/F 2546, testimony of Officer Lewis: "No one ever said that Ernest Benjamin Smith did kill the grocer."

[7] In Robinson's case the State has consistently relied upon the testimony of George Holden, driver of the getaway car and owner of the murder weapon, that Robinson was carrying the .22 caliber pistol when he returned to the car and that Robinson twice admitted to shooting the victim in the head (see 550 S.W.2d at 55-56). Holden, a convicted felon (*id.* at 60, 61) whom respondent described as the organizer of the robbery (S/F 2588, 2595, 2606, 2643), did not testify at respondent's trial.

The Texas Court of Criminal Appeals reversed Robinson's initial conviction and death sentence because the Dallas prosecutor, who had offered Holden a sentence of probation in return for his testimony (550 S.W.2d at 56), attempted to bolster Holden's account by bringing out the fact that Holden had passed a lie detector test (*id.* at 58). At his second trial Robinson was again convicted and sentenced to die, but the judgment was set aside by the state trial court due to the prosecutor's use of inadmissible evidence. *State* v. *Robinson,* Cause No. C-74-3195 PNQ, 204th Jud. Dist. Ct. of Dallas Co., proceedings of November 2, 1977. At his third trial Robinson was once more convicted and sentenced to die, but that judgment was set aside by the state trial court due to the loss of portions of the court reporter's notes. *State* v. *Robinson, supra,* proceedings of March 7, 1980. A fourth trial is pending.

of this federal habeas corpus proceeding, the State has conceded that it was Robinson who killed the victim. Brief for Petitioner Estelle, p. 5; petition for rehearing en banc in the court of appeals, p. 4; brief in the court of appeals, p. 7; answer to the habeas corpus petition, A. 91.

After Robinson fired his pistol, respondent looked over the counter at the victim and saw a .38 caliber pistol on top of a cigar box of rolled change. S/F 2532-33, 2597-98, 2669.[8] Respondent picked up the pistol and handed Robinson the cigar box,[9] and they left the store. S/F 2598. Robinson dropped some of the rolls of change on the way out, and respondent picked them up. S/F 2634, 2647. The total amount taken was either $600 (Lewis, S/F 2533) or $300 to $400 in rolls of quarters and dimes (Respondent, S/F 2599).[10]

Respondent and Robinson returned to Holden's car. According to Officer Lewis, respondent said that he

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[8] The assistant manager of the store confirmed that the supply of change kept in the cigar box was rolled. S/F 2456.

[9] According to Officer Lewis, respondent said he went behind the counter through an opening in the middle to obtain these items. S/F 2532. The victim had fallen into a corner, *ibid.*, and Officer Lewis did not testify that respondent stepped over or around the victim. Respondent denied the prosecutor's suggestion that he had done so. S/F 2627-28.

[10] The State's evidence is in conflict as to whether any bills were taken. Officer Lewis said that respondent also confessed to taking bills from the cash register, S/F 2532; James Mitchell, to whose apartment the robbers went to divide the proceeds, remembered only the rolls of change, S/F 2669. Respondent testified that no one went to the cash register because it was closed and there "was too much happening." S/F 2598. The first police officer to arrive at the scene found the cash register drawer closed. S/F 2471.

told Holden "Man, we had to shoot somebody." S/F 2533. Respondent testified that his words were "Howie had to shoot him." S/F 2629. Holden drove respondent and Robinson to the apartment of James Mitchell, where the proceeds of the robbery were divided. S/F 2599.[11]

2. The Penalty Trial

Immediately following respondent's conviction, a penalty trial was conducted before the same jury pursuant to Texas Code of Criminal Procedure Article 37.071.[12] At the outset of this proceeding the State chose to rest its case "[s]ubject to the right to reopen." A. 11. The trial judge, seeking clarification, asked the pro-

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[11] On rebuttal, the State called James Mitchell, to whom respondent had admitted the robbery, S/F 2670; Andrew Swift, to whom respondent sold the .38 caliber gun taken in the robbery and tried to sell an automatic pistol, S/F 2682; and Martha White (S/F 2691-94) and Yolanda Lewis (S/F 2694-97). The latter two testified that respondent "possessed a pistol in a public place and nothing more." *Smith* v. *State,* 540 S.W.2d 693, 699 (Tex. Crim. App. 1976); A. 44. The Texas Court of Criminal Appeals further criticized the Dallas prosecutors for using this testimony, declaring that "[i]t is this continued persistence in making borderline error that causes certain counties in this State to have a much worse reversible error record than others." *Ibid.*

The record similarly reflects that the prosecutors made numerous inflammatory remarks throughout the trial, to which the trial judge sustained objections. See S/F 2521-22, 2607, 2610-11, 2613, 2615-16, 2637, 2638, 2644-45, 2708, 2760-61, 2861. See also *Smith* v. *State, supra,* 540 S.W.2d at 699-700; A. 46.

[12] In this proceeding, the State has the burden of proving beyond a reasonable doubt that the answer to each of the following questions is "yes":

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

secutor whether he would reopen only if the defense chose not to put on any testimony. The prosecutor responded:

> I think since we are permitting them to go first, if they can start putting on their testimony as if that's the normal thing to do, then we will put on our testimony after theirs.

Ibid.

The defense first called Robert Terry Roy, owner of the .32 caliber automatic pistol carried by respondent during the robbery. Mr. Roy confirmed that the gun was defective and could not be fired. S/F 2771-72. He further confirmed that respondent was aware of these facts. S/F 2773.

The defense next called Sarah Smith, respondent's stepmother, and Louise Smith, respondent's aunt. They testified to his general truthfulness and dependability, his good grades in school, and his honorable discharge following service in Vietnam. S/F 2777-81.[13] Sarah Smith also testified that respondent is married and has two sons. S/F 2778.[14]

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(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

A "yes" answer to all three questions results in a mandatory sentence of death.

[13] An objection to a question as to whether Mr. Smith had been awarded a Purple Heart in Vietnam was sustained. S/F 2777.

[14] At the time of the offense respondent was separated, but continued to see his wife and children (ages 3 and 8) daily. S/F 2583, 2606.

The sentencing jury also had before it respondent's testimony at the trial of guilt or innocence. Mr. Smith, age 26 at the time of trial, S/F 2583, had served in the military for three years including a year and a half in Vietnam, S/F 2584. Following his honorable discharge in May of 1969, he first worked as a telephone repairman with Western Electric and then obtained a better position at Texas Instruments. S/F 2585. In 1970 he was arrested for possession of marijuana, pleaded guilty, and was placed on probation. S/F 2585-86. As a result of this conviction—Mr. Smith's only prior criminal record—he was discharged from his job at Texas Instruments and experienced difficulty obtaining steady employment. S/F 2586, 2605.[15]

Respondent also testified that when the victim appeared to reach for a pistol, he said "Look out, Howie" and tried to get out of the way himself. S/F 2596, 2600, 2601, 2621. Mr. Smith knew that the gun in his possession would not fire, S/F 2590-91, 2594, and denied attempting to fire it, S/F 2601, 2620-21, 2632. After Robinson shot the victim, respondent was "frightened" and "scared." S/F 2598. Back at the car he told George

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[15] Respondent alleged, and the State did not deny, that the quantity of marijuana was no more than a partially filled small matchbox. A. 64. In 1970, possession of any quantity of marijuana was a felony in Texas, see former Tex. Penal Code Art. 725(b) §§ 1(14), 2(a), and 23 (repealed by Acts 1973, 63rd Leg., p. 1165, ch. 429, § 602, eff. August 27, 1973), and it was not necessary to allege the quantity in an indictment, see *Fletcher* v. *State,* 282 S.W.2d 230 (Tex. Crim. App. 1955); *Gonzalez* v. *State,* 323 S.W.2d 55 (Tex. Crim. App. 1959). Today, possession of small quantities of marijuana is a misdemeanor in Texas, and possession of any quantity "may not be considered a crime involving moral turpitude." See Tex. Civ. Stat. Art. 4476-15 § 4.05.

Holden to take him home, but Holden insisted on driving to James Mitchell's house to divide the money. S/F 2599. After that Holden still refused to take respondent home, S/F 2643, so respondent spent the night on a couch at a friend's apartment, S/F 2652.[16] Mr Smith stated that he "barely slept" that night, although he had "[n]o problem sleeping" the little that he did. *Ibid.*

At the conclusion of his testimony on direct, respondent was asked:

> Q. Ernest, do you understand and know that it is wrong to do what you did and what you were involved in?
>
> A. Yes, sir.
>
> Q. Do you regret this thing has happened to Mr. Moon [the victim]?
>
> MR. MULDER [prosecutor]: We object to that.
>
> THE COURT: Sustained.

S/F 2602.[17]

After the defense had rested at the penalty phase, S/F 2781, the prosecutor called Dr. James P. Grigson. A. 11. Defense counsel moved that Dr. Grigson not be permitted to testify, noting that he was a surprise witness who had not been named on the State's witness

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[16] Respondent knew this friend's address because he had once been invited to a party there and had the address in his wallet. S/F 2650. He did not say that he attended a party following the robbery.

[17] The district court, in its opinion granting habeas corpus relief, criticized both the prosecutor for interposing this objection and defense counsel for not recalling Mr. Smith at the penalty phase to complete his answer. See *Smith* v. *Estelle*, 445 F.Supp. 647, 658-59 n.18 (N.D.Tex. 1977); A. 141.

list submitted in advance of trial. A. 16. The trial judge, by order of January 4, 1974, had directed the prosecutor to list all of the witnesses to be used in the State's "case in chief" both at the guilt stage, and, "if known," at the punishment stage. A. 4-5. The prosecutor's list, filed on March 11, 1974, had not included Dr. Grigson. A. 7. On March 25, 1974, the opening day of the guilt trial, the court had entered an order prohibiting the prosecutor from calling any person not on the list. A. 9.

At the penalty trial, Dr. Grigson testified on *voir dire* examination outside the presence of the jury that he had visited respondent on February 18, 1974. A. 14. He went to the jail after having been told by the prosecutor that the trial judge wanted him to examine Mr. Smith. A. 15.[18] The doctor had not advised defense counsel of the interview. A. 14.[19] He had, however, discussed his findings with the prosecutor, A. 14, 15, and the prosecutor had asked him in advance to testify in this case, A. 15-16. Then, on the Thursday before the trial began, the prosecutor had advised Dr. Grigson that he would be needed the following week:

> Q. When did he tell you that you would be called to testify?

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[18] The trial judge, in an affidavit submitted to the district court below, confirmed the oral nature of the request. The judge further stated that the defense attorneys had never raised any question of respondent's competence or sanity, and that he had requested the examination solely to satisfy himself personally that Mr. Smith was competent to stand trial. See p. 25-26, *infra*.

[19] Defense counsel had been appointed on October 25, 1973, see note 5 *supra;* respondent had been indicted on December 28, 1973, A. 1, 125, Tr. 4-5.

A. Let's see. I only knew I was testifying today about—let's see—1:45. No, must have been about 2:30. I had seen Mr. Mulder last Thursday, and he said that they had selected a jury and that they were putting on the trial and would probably need me to testify some time this week.

A. 15.

Q. Did he ever indicate that you would be called to testify?

A. Yes. Last Thursday, certainly he said that it looked like, you know, they were getting a jury, and he would probably need me to testify this week.

Ibid.[20]

Defense counsel's motion to bar Dr. Grigson's testimony was overruled without explanation by the trial judge, and the doctor was permitted to testify against respondent. A. 17. Defense counsel accepted the trial judge's offer of a one-hour recess. *Ibid.*

Dr. Grigson testified that he had spoken with Mr. Smith for approximately 90 minutes. A. 27, 30. He had conducted a "mental status examination," A. 20, which included asking respondent what he was doing "on or around or about the time that the alleged offense took place," A. 21. Mr. Smith had co-operated fully with the doctor, and had been pleasant, courteous, and extremely

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[20] The trial of guilt or innocence began on a Monday (March 25, 1974) and concluded the following afternoon (Tuesday, March 26th). Immediately thereafter on that same Tuesday, the penalty trial was conducted. See A. 1, Tr. 5. The previous Thursday referred to by Dr. Grigson (March 21st) was five days prior to the date of the doctor's testimony.

polite. A. 29, 31, 32, 33. The doctor had not spoken with Mr. Smith's relatives or conducted any investigation of respondent other than the 90-minute interview. A. 31-32.

Dr. Grigson felt, based upon respondent's answers during the interview, A. 32, that respondent had shown no remorse for the crime, A. 22, 24, 26. The doctor concluded that respondent was a "very severe sociopath" who would continue to commit criminal acts of violence. A. 24, 25-26. Dr. Grigson further stated that no psychiatric treatment could change respondent's behavior, A. 25, and that respondent could not improve but could only continue the same way or get worse, A. 24-25.

Dr. Grigson was the State's only witness at the penalty phase. Following summations[21] and the court's charge, the jury answered "yes" to all three questions posed by Tex. Code Crim. Pro. Art. 37.071(b). Tr. 121.[22] A judgment accordingly was entered imposing the death penalty. Tr. 123.

3. The Appeal

In his brief on appeal, Mr. Smith's principal trial attorney argued that the defense had been prejudiced at

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[21] In summation, the prosecution relied heavily upon Dr. Grigson's testimony and stressed that "[h]e wasn't hired by the State. He was appointed by the Court. Evidently the Court has confidence in his evaluations . . ." S/F 2855.

[22] See note 12 *supra*. During its deliberations the jury asked the court to "give us examples of criminal acts of violence." Tr. 85. The court declined to do so. Tr. 86.

the penalty phase because of the manner in which Dr. Grigson had been brought into the case:

> The Court appointed a psychiatrist who, unknown to defense counsel (T-2949) [A. 14] and in collusion with the State, examined the defendant, [sent] a report to the Court and to the State, conferred with the State, was never listed as a State's witness in contempt of a Motion to "List", then testified in a crucial part of the trial as to his findings over objection (T-2931) [A. 16], and contrary to a Motion in Limine granted by the Court (T-65) [A. 9].

Brief for Appellant in *Smith* v. *State,* pp. 45-46. The brief contended that this occurrence, taken together with other acts of prosecutorial misconduct during the trial (see note 11 *supra*), had the effect of "denying Appellant a fair trial"—especially "when viewed in the light that this was a case in which the State was seeking a verdict of *DEATH," id.* at 45 (emphasis in original).

On February 18, 1976, the Texas Court of Criminal Appeals affirmed Mr. Smith's conviction and death sentence. *Smith* v. *State, supra,* 540 S.W.2d 693; A. 37. The court ruled upon the merits of the claim concerning Dr. Grigson's testimony: it held that Dr. Grigson had been used as a "rebuttal" witness, and therefore did not come within the purview of the trial judge's order requiring the State to list the witnesses for its "case in chief." 540 S.W.2d at 699; A. 45. The court also commented that Dr. Grigson's interview should have placed Mr. Smith himself on notice that the doctor might testify. *Ibid.*

Judges Odom and Roberts of the Court of Criminal Appeals dissented as to respondent's sentence, in separate opinions. A. 48, 58. Judge Odom's dissent, in which Judge Roberts concurred, focused primarily on the testimony of Dr. Grigson. Noting that the State's brief relied exclusively upon the doctor's testimony to support the death sentence, A. 49,[23] Judge Odom stated that "such future-telling testimony is admissible under no theory of law and prejudicial beyond relief, requiring reversal of this case," A. 51. "The introduction of such highly prejudicial psychiatric speculations deprived appellant of a fair trail at the punishment stage." A. 53.

In his application for rehearing, pp. 6-7, defense counsel again protested the surprise nature of Dr. Grigson's testimony:

> No one, not the Court or anyone else, ever advised Appellant's lawyers about [Dr. Grigson's] visit, before or after. It was logical to assume that this was a routine examination to fulfill a responsibility to determine that the Defendant being put on trial was sane.

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[23] See brief of Appellee State of Texas in the Court of Criminal Appeals, p. 4: "In conclusion, it seems difficult to imagine a situation where there would be any more qualified and explicit evidence to support a jury's finding than the unchallenged expert testimony of Dr. James P. Grigson which is outlined above. Hence, the evidence is clearly sufficient and no error is presented."

> . . . the really *scary* thing here is that in Dallas County the *State* can send a "doctor" into the jail, who by and through his medical cloak can discuss the minute details of a crime with an unwary, unsuspecting Defendant, and then go back and discuss his interview and his "findings" with an Assistant District Attorney. This is what Dr. Grigson did as *shown* by the record. (Emphasis in original.)

The application asserted (p. 6) that the prosecution's use of Dr. Grigson at the penalty trial violated this Court's decision in *Brady* v. *Maryland,* 373 U.S. 83 (1963).

The Court of Criminal Appeals denied rehearing on July 14, 1976. At this time, Judges Odom and Roberts withdrew their dissenting opinions. 540 S.W. 2d at 700; A. 47.[24] On March 7, 1977, this Court denied certiorari, 430 U.S. 922, with Justices Brennan, White and Marshall dissenting.

4. The State Habeas Corpus Proceeding

Following the denial of certiorari, the state trial judge set an execution date of April 26, 1977.

On April 18, 1977, respondent filed a state habeas corpus petition raising claims identical to those subsequently alleged in his federal habeas corpus petition. By order of April 20, 1977, the Texas Court of Criminal Appeals denied habeas corpus relief. The court did not state any reasons for its decision.

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[24] For an analysis of the reasons for this action, see Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics,* 5 Am. J. Crim. L. 151, 166-67 n.24 (1977).

B. Proceedings In The Federal Courts

1. The Petition

Respondent filed his federal habeas corpus petition on April 21, 1977. The petition alleged, *inter alia,* that "the introduction of the testimony of Dr. Grigson at petitioner's trial violated his privilege against self-incrimination and his rights to fair notice and the effective assistance of counsel." Petition, ¶ 12(B), A. 72-73. Mr. Smith alleged that Dr. Grigson had gone to see him prior to trial, without notifying defense counsel or obtaining counsel's permission, and that "[t]he record is silent, and neither petitioner nor his counsel has information, as to why a psychiatric evaluation was ordered prior to his trial." A. 72. The petition further alleged that Dr. Grigson had not been named on the State's witness list, despite the trial court's order requiring the prosecution to provide such a list and despite the prosecution's having told Dr. Grigson prior to trial that he would be called; and that defense counsel did not know until about ten minutes before the doctor took the stand that he would be a witness. A. 72-73. The petition alleged that these circumstances

> prevented petitioner's trial counsel from effectively defending against the charge that there existed a probability that petitioner would commit criminal acts of violence that would constitute a continuing threat to society.

A. 73.

Mr. Smith also alleged that he had not been told before or during his conversation with Dr. Grigson that

his statements to the doctor could be used against him at trial, or that he had a right to consult with counsel and/or have counsel present, or that he had a right to remain silent, or that he had a right to terminate the interview. A. 73. In sum, he alleged that

> [n]o circumstance pertaining to the interview provided notice to petitioner that it had any adversarial purpose or that his statements could form the basis of, or be used as evidence to support, a determination that he should be put to death.

Ibid. Noting that Dr. Grigson's testimony had included his recollection of Mr. Smith's statements concerning the facts of the crime, the petition alleged that

> [p]etitioner was unwittingly induced to provide, by his own statements, the only evidence offered by the prosecution to suggest that he might be dangerous in the future and should therefore be put to death.

Ibid.[25]

2. The District Court's Orders of April 22 and 29, 1977

On April 22, 1977, the district court (Hon. Robert W. Porter) stayed Mr. Smith's execution. A. 85-87. On April 29, 1977, the court entered an order requiring the State to file an answer and requiring Mr. Smith to file "a report detailing with specificity the factual disputes in this case." The order stated that "[a]fter this factual report is received the court will promptly determine whether an evidentiary hearing is required." A. 88-89.

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[25] The petition also alleged that Mr. Smith's death sentence violated the Eighth and Fourteenth Amendments because he had been denied constitutionally adequate consideration of mitigating circumstances. A. 63, 65-66.

3. The State's Answer

The State's answer did not address Mr. Smith's claim that he had been denied fair notice of the prosecution's intention to call Dr. Grigson, other than to say that "[c]ounsel for Petitioner was supplied with a report by this physician and was aware of the result of the examination." A. 96. None of the factual allegations of the petition pertinent to this claim were specifically denied,[26] and the State did not claim that Mr. Smith's counsel had made an insufficient objection to Dr. Grigson's testimony at trial. See A. 95-96.

In response to the Fifth and Sixth Amendment claims of the petition, the State again did not plead the defense of waiver; the answer addressed the issues on the merits. The State did not specifically deny or dispute any of the petition's factual allegations underlying these claims, but rather argued as a matter of law that Mr. Smith had no right to remain silent during Dr. Grigson's interview or to have counsel present. A. 95-96.

4. Letter to the District Court Delineating Factual Disputes

By letter of August 25, 1977 to Judge Porter, with a copy to the State's attorney, one of Mr. Smith's lawyers delineated the issues which he thought were unlikely to involve factual disputes and were therefore

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[26] The answer contains a general concluding paragraph stating that "Respondent denies each and every allegation of fact made by the Petitioner except those specifically admitted to herein or those supported by the Record." A. 102.

fit for resolution on summary judgment. Among those listed were the Fifth and Sixth Amendment questions raised by paragraph 12(B) of the habeas corpus petition. A. 104-06. The State's attorney did not reply to the letter.

5. The District Court's October 1977 Request for Affidavits

By letter to Mr. Smith's principal trial attorney, dated October 6, 1977, Judge Porter requested that certain facts outside the record be clarified by affidavit. The attorney, John F. Simmons,[27] and his co-counsel at trial, Howard Wilson, were asked the following questions:

(1) What procedures were used to appoint Dr. Grigson to examine Mr. Smith;

(2) Were you or Mr. Wilson notified of this appointment;

(3) Did you or Mr. Wilson at any time give notice, either oral or in writing that you would plead an insanity defense on behalf of Mr. Smith; or did you raise the question of his competency to stand trial;

(4) To your knowledge was a written order entered by the court appointing Dr. Grigson;

(5) What was your understanding as to the purpose of Dr. Grigson's appointment;

(6) When did you and Mr. Wilson become aware that Dr. Grigson had examined Mr. Smith;

(7) Were you or Mr. Wilson ever furnished with a copy of Dr. Grigson's report or a copy of his letter to the Court summarizing his findings?

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[27] Mr. Simmons continued to serve as one of Mr. Smith's attorneys of record in the federal habeas corpus proceeding.

A. 107. Judge Porter sent a copy of this letter to the State's attorney, and directed her to prepare and file controverting affidavits "if she determines them appropriate." A. 108.

The affidavits submitted by Mr. Simmons and Mr. Wilson stated that the attorneys had no idea what procedures had been used to bring Dr. Grigson into the case, were never notified of any appointment of the doctor by the trial judge, and knew of no order reflecting any such appointment. A. 109-10, 112, 115. They had never raised any question concerning Mr. Smith's competence to stand trial or his sanity. A. 109-10, 113, 115. They had not learned of Dr. Grigson's interview with their client until some time after jury selection had begun; then, looking through the court file, they had noticed a letter in the file from Dr. Grigson to the trial judge.[28] They had attached no significance to the letter, assuming that the judge had merely asked for an informal examination to be certain in his own mind that the defendant was competent to stand trial. A. 110-112-13, 116. They knew of no written report by Dr. Grigson. A. 110, 113, 116.

The State responded by filing an affidavit from the trial judge, R.T. Scales. He confirmed that Mr. Smith's

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[28] The letter, dated February 28, 1974, contains a brief summary of Dr. Grigson's evaluation of respondent based upon an interview at the Dallas County Jail on February 18, 1974. Dr. Grigson concluded that "it is my opinion that Ernest Benjamin Smith, Jr., is aware of the difference between right and wrong and is able to aid an attorney in his defense. If I can be of any further help to you regarding this case, please let me know. He is a severe sociopath." A. 6.

attorneys had not raised any question of competence or sanity, and that he had nonetheless asked Dr. Grigson to visit the defendant in order to satisfy himself personally that Mr. Smith was competent to stand trial. A. 117. Judge Scales further stated that his request to Dr. Grigson was made by oral communication and was not reflected by written order or letter, A. 118, and that "[a]s best I recall," he had notified Mr. Simmons of the appointment, *ibid.* The judge added that he had placed Dr. Grigson's letter in the court file, and that he knew of no written report by the doctor. *Ibid.*

6. The District Court's December 1977 Request for Affidavits

At the district court's request, A. 142, Mr. Simmons submitted an additional affidavit on December 21, 1977. A. 121. In this affidavit, he stated that his general objection to Dr. Grigson's testifying at the penalty trial was based upon "all the matters brought out in the just-completed [*voir dire*] hearing," and primarily upon the State's failure to name the doctor on its witness list. A. 122. He had not interposed a more specific objection because "so far as I knew at the time this had been a routine psychiatric examination by a court-appointed psychiatrist to determine the defendant's competency to stand trial . . . At the time I was surprised that there could be anything Dr. Grigson could testify to on punishment that would be germane to the issues. I certainly had no suggestion that the State intended to use Dr. Grigson's testimony as a basis for sending Ernest

Benjamin Smith to the Electric chair." *Ibid.* The State did not file a responsive affidavit.

7. The District Court's Opinion

On December 30, 1977, Judge Porter issued his opinion, invalidating Mr. Smith's death sentence on four separate constitutional grounds. *Smith* v. *Estelle,* 445 F.Supp. 647 (N.D. Tex. 1977); A. 124-153.

a. Due Process violation

The district court held that Mr. Smith had been denied due process of law by the manner in which the prosecution used Dr. Grigson's testimony at the penalty trial.

Recounting the facts surrounding the doctor's appearance, as reflected by the trial record and the affidavits, Judge Porter found that "[t]he state's evidence at the punishment stage was introduced in such a way as to deny defense counsel effective cross examination of Dr. Grigson." 445 F.Supp. at 655; A. 133. By putting Dr. Grigson on the stand as a surprise witness after the defense had rested, the prosecution also effectively precluded defense counsel from calling psychiatric witnesses for the defense. 445 F.Supp. at 655; A. 134. The court explicitly found that the prosecution had "intentionally omitted Dr. Grigson's name from the witness list in violation of the trial court's order even though the prosecutor knew at least several days before the punishment stage that Dr. Grigson would be called as a witness

and that his testimony would not be rebuttal testimony but would be critical to the state's case." *Id.* at 658; A. 139.

Judge Porter noted that "[e]ffective cross examination and the ability to obtain a psychiatric expert for the defendant are especially critical when psychiatric testimony is introduced because studies have shown that the opinions of psychiatrists in this area [prediction of future dangerousness] are often unreliable and invalid." *Id.* at 655; A. 134. The district court summarized an extensive body of psychiatric and legal writings questioning the ability of psychiatrists to predict future violent acts. *Id.* at 655-57; A. 134-38. It did not conclude that such testimony should be excluded from evidence, but did hold that:

> [W]hen the state introduces psychiatric testimony on dangerousness at the punishment phase of a capital trial the defense must have a fair opportunity to cross examine that testimony and rebut it with expert testimony on behalf of the defendant. When that fair opportunity is denied the defendant, as it was here, our adversary system breaks down and a man is unjustly sentenced to die.

Id. at 657; A. 138.

In summary, the district court concluded that due process had been violated because of the concurrence of the following seven factors at respondent's trial:

> (1) Dr. Grigson was informed of his appointment by the prosecutor and not through written order of the court; (2) defense counsel was never notified of the appointment; (3) a psychiatric report was never

> filed; (4) defense counsel never received a copy of Dr. Grigson's letter summarizing his conclusions, sent to the judge; (5) the state's attorney intentionally omitted Dr. Grigson's name from the witness list in violation of the trial court's order even though the prosecutor knew at least several days before the punishment stage that Dr. Grigson would be called as a witness and that his testimony would not be rebuttal testimony but would be critical to the state's case; (6) the psychiatrist was appointed to determine competency but was permitted to testify on the completely unrelated issue of "dangerousness"[29] and; (7) the trial judge permitted the state's attorney to create the impression with the jury that Dr. Grigson had been appointed by the Court for the purpose of determining the defendant's "dangerousness" and that the court was therefore vouching for Dr. Grigson's testimony.

Id. at 658; A. 139 (footnote omitted).

Judge Porter added that if Dr. Grigson had been brought into the case in a manner consistent with due process, and defense counsel had nonetheless failed to seek out defense psychiatric testimony for use at the penalty phase and to "explore the ramifications of the psychiatric issue," the court would be compelled to hold on this record that Mr. Smith had been denied effective assistance of counsel. *Id.* at 658 n.16; A. 139. The district court found, however, that "[u]nder the above described circumstances" defense counsel had protected their client's interest "to the extent possible"; it therefore declined to find ineffective assistance. *Ibid.*

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[29] The district court concluded that if the prosecution intends to call at the penalty phase a psychiatrist appointed by the trial judge for a different purpose (*e.g.*, to conduct a competency exam), notice of its intention must be given to defense counsel. *Id.* at 657 n.15; A. 138-39. [Footnote added.]

b. Eighth Amendment violation

The district court held that the circumstances constituting a due process violation also resulted in a violation of respondent's Eighth Amendment rights. The court noted that under *Jurek* v. *Texas,* 428 U.S. 262 (1976), the constitutionality of the Texas death-sentencing procedure "rests upon the ability of the defendant to present mitigating circumstances." 445 F.Supp. at 658; A. 140. Here, Mr. Smith had been denied that right because he had been effectively deprived of the opportunity to challenge Dr. Grigson's highly assailable testimony and to obtain countervailing psychiatric testimony in his own behalf. Judge Porter held that since the jury had been precluded by the state's misconduct from considering all relevant evidence on the question of penalty, Mr. Smith's death sentence constituted cruel and unusual punishment. *Id.* at 659; A. 141.

c. Fifth Amendment violation

The district court held that a Texas capital defendant may not be compelled to submit to a psychiatric examination to determine his possible future dangerousness; that respondent accordingly had a Fifth Amendment right to remain silent when interviewed by Dr. Grigson; and that the failure to advise him of that right in the present context rendered his death sentence constitutionally invalid. The court based its ruling upon the unique nature of the psychiatric examination conducted here: unlike a competency exam, which is non-

adversarial in nature, this examination was employed for the highly adversarial purpose of attempting to bring about petitioner's execution; and unlike a sanity exam, which results from the defendant's raising a question as to his own sanity, this examination was used because the prosecution sought by psychiatric evidence to satisfy its burden of proving future dangerousness—an issue which it alone had raised. 445 F.Supp. at 663; A. 149-50. In this setting, the court held that

> [i]f . . . the Defendant does not request a psychiatric examination on the issue of "dangerousness" and does not seek to introduce testimony on this issue, he may not be compelled to participate in a psychiatric examination to determine dangerousness.

Id. at 663-64; A. 151.

Referring specifically to the Grigson examination and testimony, Judge Porter rejected the State's contention that Mr. Smith's communications to Dr. Grigson were "non-testimonial" in nature. "Here it is not only the *way* the Defendant communicates to the psychiatrist, but also the content of *what* he says that forms the basis of the expert opinion." *Id.* at 662; A. 148 (emphasis in original). See also the footnote to this passage, setting forth an example of Dr. Grigson's reasoning from the content of respondent's statements to him. *Id.* at 662 n.27; A. 148.

Judge Porter observed that by the prosecution's own concession, Dr. Grigson's testimony was the only evidence it had to meet its burden of proof on the issue

of probable future dangerousness. *Id.* at 663; A. 150; see also note 23, *supra.* Yet "[t]his testimony would have been gutted—if not rendered completely worthless, without the cooperation of Smith." *Ibid.* Accordingly, the district court concluded that if the State wishes to conduct a psychiatric examination on the subject of the defendant's probable future dangerousness, it must warn the defendant of his right to remain silent. Finding upon undisputed facts that "Smith was not so advised in this case," the court held that his death sentence was obtained in violation of his rights under the Fifth Amendment. *Id.* at 664; A. 151.[30]

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[30] Although no issue of waiver had been raised by the State, the district court commented on the possible applicability of the Texas "contemporaneous objection rule" to Mr. Smith's Fifth Amendment claim. (This issue was again not advanced in the certiorari petition, but the State has briefed it before this Court. The State's brief also seeks now to interject a "contemporaneous objection" argument under Texas law as to the other issues in this case, although it did not advance that argument in either the certiorari petition or in any of the proceedings in the courts below.) The district court ruled that the State's failure to plead the Texas "contemporaneous objection rule" in its answer constituted a waiver of that defense, and commended the State for joining issue on the merits to facilitate decision of the Fifth Amendment question. *Id.* at 659-60; A. 142-43. Judge Porter further found that, in any event, Mr. Smith had clearly met the "prejudice" test of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), insofar as *Sykes* might govern consideration of the Fifth Amendment issue where the trial objection to Dr. Grigson's testimony had not been rested specifically upon Fifth Amendment grounds. He did not decide whether respondent had met the "cause" test of *Sykes,* but merely noted that he had requested defense counsel's affidavit of December 21, 1977, to provide a record on that question should the appellate courts hold *Sykes* applicable notwithstanding the State's failure to invoke it. *Ibid.*

d. Sixth Amendment violation

Judge Porter held that Texas capital defendants do not have a Sixth Amendment right to the presence of counsel during a psychiatric interview.[31] He did find a Sixth Amendment violation here, however, arising from the surprise nature of Dr. Grigson's testimony. Since defense counsel had been effectively prevented from refuting the doctor by cross examination and the calling of additional experts, Mr. Smith had been deprived of effective assistance of counsel. 445 F.Supp. at 660-61; A. 143-46.[32]

8. The State's Motion for a New Trial

The State moved for a new trial pursuant to F.R. Civ. P. 59 (a). In this motion the State sought for the first time to invoke the "contemporaneous objection" rule on the Fifth Amendment issue, noting that defense counsel's contemporaneous objection to Dr. Grigson's testimony at the trial had not specified a Fifth Amendment claim. Also for the first time, the State requested an evidentiary hearing.

The district court denied the motion on March 27, 1978. The court stated that a Rule 59 (a) motion should

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[31] As previously noted, he did hold that defense counsel must be advised in advance that such an interview is to take place. *Id.* at 657 n.15; A. 138-39.

[32] The district court expressly declined to rule upon several other constitutional challenges to Mr. Smith's death penalty raised by the habeas corpus petition: ". . . as I have granted the relief requested with respect to the punishment phase it is unnecessary to reach these additional issues." *Id.* at 664; A. 152.

not be granted "to enable the moving party to present a different theory than he adopted at trial." A. 154. And Judge Porter declined to reopen the case for a hearing, noting the State's belated request for a hearing "with some amazement" because the State had earlier been presented "with every opportunity to demand such a hearing" but had failed to do so. A. 155.

9. The Fifth Circuit's Opinion

On September 13, 1979, the court of appeals unanimously affirmed the district court's decision. *Smith* v. *Estelle,* 602 F.2d 694 (5th Cir. 1979); Appendix A to the certiorari petition.

a. Due Process and Eighth Amendment violations

The court of appeals held that the prosecutors' conduct in this case violated Mr. Smith's rights under *Gardner* v. *Florida,* 430 U.S. 349 (1977):

> The defect which the Supreme Court identified in *Gardner*—defense counsel's inability to challenge or answer the evidence on which the death sentence was based . . . —is conspicuous here as well. As a result Smith's sentencing hearing was at least as unreliable as the proceedings in *Gardner*. And the justifications for the unreliable procedures were far weaker here.

602 F.2d at 699; certiorari petition appendix (hereinafter "CA") at 8-9.[33] Observing that "[s]urprise can be as ef-

[33] The court noted that "[t]he principles of *Gardner* seem to be derived from both the eighth amendment and the due process clause

fective as secrecy in preventing effective cross-examination, in denying the 'opportunity for [defense] counsel to challenge the accuracy or materiality of' evidence, *Gardner* v. *Florida,* 430 U.S. at 357 . . . , and in foreclosing 'that debate between adversaries [which] is often essential to the truth-seeking function of trials,' *id.* at 360," the court concluded that the prosecutors' use of Dr. Grigson as a surprise witness was basically unfair and "devastating" to Mr. Smith. *Id.* at 699; CA. 9-10.

The court noted the psychiatric and legal authorities questioning the ability of psychiatrists to predict future dangerousness, and also observed Dr. Grigson's extensive record of testifying for the prosecution and repeatedly predicting future dangerousness in capital cases. *Id.* at 699-701 n.7; CA. 10-13. It concluded that "[e]ven a moderately well prepared defense attorney would have had some success in impeaching Dr. Grigson's testimony or offering an opposing view," through readily available material which could have been presented if defense counsel had not been caught unprepared by the State's tactics. *Id.* at 700 n.7; CA. 11.[34]

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of the fourteenth amendment." See 602 F.2d at 698-99 n.4; CA. 8. The court of appeals did not address the district court's additional holding that by unfairly hampering respondent's ability to challenge or answer Dr. Grigson's testimony, the prosecutor's surprise tactic also violated Mr. Smith's Sixth Amendment right to effective assistance of counsel.

[34] The court rejected on several grounds the State's claim that defense counsel's failure to move for a continuance constituted a procedural default: (i) the State had not pleaded the issue in the

In its brief in the court of appeals, the State had claimed for the first time that Dr. Grigson was not a rebuttal witness but rather was "temporarily unavailable to testify" at the outset of the penalty trial. Fifth Circuit Brief for Appellant Estelle, p. 23. The court of appeals noted that this claim (i) was outside the record; (ii) was inconsistent with the factual ground upon which the Texas Court of Criminal Appeals had affirmed Mr. Smith's death sentence; and (iii) did not excuse the State's failure to add the doctor to the court-ordered witness list. 602 F.2d at 703 n.12; CA. 17. *Id.* at 702 n.11; CA. 16. The court of appeals criticized the prosecution's behavior as "irresponsible conduct," *id.* at 703, CA. 17, and held that Judge Porter's finding of a deliberate attempt to surprise defense counsel was not clearly erroneous. *Id.* at 702-03; CA. 16-17.[35]

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district court; (ii) the State did not argue before the Fifth Circuit that under Texas law, "moving for a continuance is the only way to object to surprise"; and (iii) if defense counsel did commit a procedural default, it should either be excused or deemed ineffective assistance of counsel under the circumstances. The court further noted that in *Gardner* there had been no objection at all in the state trial court; here, defense counsel had objected to Dr. Grigson's testimony. *Id.* at 701 n.8; CA. 13-14.

[35] The court of appeals also rejected the State's claim that the trial judge's affidavit, stating that "[a]s best I recall" he informed Mr. Simmons of Dr. Grigson's appointment, created a material dispute of fact necessitating an evidentiary hearing. The court noted that even if Mr. Simmons had been so informed, the judge's only stated purpose in requesting the examination was to assess competency; defense counsel, in the absence of notice by the prosecution, would still have been justified in viewing the interview as irrelevant to the penalty trial. *Id.* at 699 n.5 & n.6; CA. 9.

b. Fifth and Sixth Amendment violations

The court of appeals observed that its due process and Eighth Amendment holding, standing alone, would not preclude the use of Dr. Grigson's testimony at a new trial. It further noted that the testimony was admissible under Texas law because the Texas Court of Criminal Appeals had rejected claims of Fifth and Sixth Amendment violations under the circumstances present here, see, *e.g.*, *Livingston* v. *State,* 542 S.W.2d 655 (Tex. Crim. App. 1976). Since the Fifth and Sixth Amendment questions had been decided below and briefed by the parties on appeal, and since the failure to resolve those questions now could result in additional federal collateral proceedings, the court of appeals proceeded to consider them. 602 F.2d at 703 n.13; CA. 18-19.

The court concluded that Mr. Smith clearly had a Fifth Amendment privilege not to speak to Dr. Grigson.[36] It rejected the State's contention that Mr. Smith's communications to the doctor were "non-testimonial," finding that the State had "used the content, not the non-testimonial aspects" of the examination. *Id.* at 704; CA. 19-20. It adhered to Fifth Circuit case law holding that the privilege is inapplicable where a criminal defendant himself raises the defense of insanity, see *United States* v. *Cohen,* 530 F.2d 43 (5th Cir.

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[36] The court observed that a defendant on trial for his life could hardly be compelled to speak with the State's psychiatrist by means of contempt proceedings or the threat of commenting to the jury on his silence. *Id.* at 707; CA. 26-27.

1976); but it distinguished *Cohen* because here Mr. Smith had not sought to present any psychiatric claims or evidence, but rather the State had affirmatively used a psychiatric examination in the first instance to make its case for his execution. *Id.* at 704-05; CA. 20-22.[37] Depriving the prosecution of the use of compelled psychiatric examinations for this purpose would not disable it from obtaining death sentences: the future-dangerousness question posed by the Texas death-sentencing statute is not peculiarly within the realm of psychiatric expertise; and this Court, in approving the statute, had not contemplated a narrow battle of psychiatric experts but rather a far more comprehensive inquiry. *Id.* at 705-06; CA. 22-25.

The court of appeals found that "[n]o one ever told Smith that Dr. Grigson's examination concerned more than Smith's competence to stand trial. No one ever revealed that their ninety-minute interview would be used to gather the evidence that would send Smith to his death. These facts are undisputed. . . ." *Id.* at 703; CA. 18. It concluded that unless some Fifth Amendment protection was afforded, the State can,

> . . . in an effort to gain the defendant's cooperation, mislead him or indeed lie to him about the significance of the examination; it can take advantage of his ignorance or lack of understanding. It can coerce him in any way that does not make his

[37] The court noted that if a Texas capital defendant seeks to offer psychiatric testimony of his own at the penalty phase, he may well be deemed to have waived the privilege, and to be precluded from offering such testimony if he refuses to be examined by the State's psychiatrist. 602 F.2d at 705 & n.15, 707; CA. 21, 22, 26.

> statements less useful to the interrogating psychiatrist. Psychological pressure, sharp practices, and deceit are likely to be, in effect, the means of compelling examinations. These tactics are inherently discriminatory. A knowledgeable defendant, or one with vigilant attorneys, will either simply refuse to submit to an examination or will bargain with the state to have the examination conducted by a psychiatrist who is more likely to favor the defense. Only defendants who do not know better will allow themselves to be examined by psychiatrists antecedently favorable to the state.

Id. at 707-08; CA. 27. Accordingly, the court held that

> a defendant may not be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial. If a state wishes to prove a defendant's propensity to commit future crimes of violence by using evidence gathered at a psychiatric examination, the defendant must voluntarily consent to the examination. It follows that Judge Porter was correct when he held that if a defendant indicates that he wishes to remain silent, "he may not be questioned by the psychiatrist for the purpose of determining dangerousness." [445 F.Supp. at 664; A. 151] Judge Porter also held that the defendant must be warned that he had a right to remain silent; since Smith was in custody when he was interviewed, this holding, too, was correct.

Id. at 708; CA. 27-28.[38]

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[38] The court of appeals rejected the State's contention that the failure of defense counsel to interpose a specific Fifth and Sixth Amendment objection forfeited respondent's rights, noting that: (i) the State had not properly raised the issue below; (ii) since Texas law was squarely against the defendant, such an objection would have been futile; and (iii) given the surprise nature of Dr. Grigson's appearance, defense counsel should not be faulted for failing to enumerate every constitutional right involved when he objected to the doctor's testimony. *Id.* at 708 n.19; CA. 28.

Finally, the court of appeals held that a Texas capital defendant has a Sixth Amendment right to the assistance of counsel in deciding whether to submit to such an examination. It agreed with Judge Porter that there is no constitutional right to have counsel present during the examination, but observed that the decision whether or not to speak with the psychiatrist

> . . . is a vitally important decision, literally a life or death matter. It is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, of possible alternative strategies at the sentencing hearing. For a lay defendant, who is likely to have no idea of the vagaries of expert testimony and its possible role in a capital trial, and who may well find it difficult to understand, even if he is told, whether a psychiatrist is examining his competence, his sanity, his long-term dangerousness for purposes of sentencing, his short-term dangerousness for purposes of civil commitment, his mental health for purposes of treatment, or some other thing, it is a hopelessly difficult decision. There is no reason to force the defendant to make it without "the guiding hand of counsel." *Powell* v. *Alabama,* 287 U.S. 45, 57 . . . (1933).

Id. at 708-09; CA. 29.[39]

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[39] The court noted that respondent had already been indicted, and counsel had already been appointed to represent him, prior to the time of Dr. Grigson's examination. *Id.* at 709; CA. 29-30.

10. The State's Petition for Rehearing En Banc

The State sought rehearing en banc on two grounds: (1) that the district court should have conducted a hearing; and (2) that the failure of respondent's counsel to place his trial objection specifically on Fifth and Sixth Amendment grounds constituted a procedural default. Pet. for Rehearing En Banc, pp. 4-9.

On October 22, 1979, rehearing en banc was denied without dissent. None of the judges of the Fifth Circuit requested a poll.

11. The Certiorari Petition

In its certiorari petition, the State abandoned its claim of procedural default and sought review by this Court on three issues: (1) whether there should have been an evidentiary hearing "as to the disputed surprise issue" (cert. pet., p. 4); (2) whether the court of appeals' holding under *Gardner* was incorrect; and (3) whether the court of appeals' Fifth and Sixth Amendment holding was incorrect. The petition does not contain a word concerning the adequacy of defense counsel's trial objections, and does not claim that a hearing was necessary as to the Fifth and Sixth Amendment issues. Upon that petition, this Court granted certiorari on March 17, 1980. _____ U.S. _____, 48 U.S.L.W. 3602.

SUMMARY OF ARGUMENT

I

This case is before the Court upon affirmed findings of fact that the trial prosecutors deliberately omitted Dr. Grigson from the court-ordered witness list in order to surprise Mr. Smith's defense attorneys. The record clearly reflects that Dr. Grigson discussed his findings with the prosecutors in advance of trial, was asked by the prosecutors in advance of trial to testify, and was told by the prosecutors five days in advance of his testimony that he would be called the following week. Yet at no time did the prosecutors advise defense counsel of their intention to call the doctor. Despite the trial court's order precluding the prosecutors from calling in their case in chief any witness not listed, Dr. Grigson was permitted to testify against respondent at the penalty trial.

The use of Dr. Grigson as a last-minute surprise witness deprived the defense of any fair opportunity to meet his extremely prejudicial testimony. His confident predictions of Mr. Smith's supposed future dangerousness, based on a single 90-minute interview, were highly impeachable. But for the prosecutors' tactics defense counsel could have presented abundant authority, through cross examination and defense expert witnesses, for the proposition that Dr. Grigson's predictions were fundamentally unreliable.

The issue here is not whether Dr. Grigson's predictions, or the skepticism of the majority of his profession

as to the reliability of those predictions, are in fact correct. The issue is simply whether the prosecutors' misconduct prevented the sentencing jury from hearing both sides. Since Mr. Smith's one prior conviction for possession of marijuana and his subsequent unemployment hardly establish a propensity to commit future violent criminal acts, Dr. Grigson's predictions were crucial to the State's case for a death sentence. To inflict the penalty of death on the basis of such testimony—unreliable and untested because of a prosecutor's trick—violates Due Process and the Eighth Amendment.

The State's claim that defense counsel's vigorous contemporaneous objection to Dr. Grigson's testimony was inadequate as a matter of Texas law was not raised in the certiorari petition and should not be considered. It has never been raised by the State at any time until its brief in this Court. Furthermore, on the state appeal the Texas Court of Criminal Appeals reached the merits of Mr. Smith's challenge to the surprise nature of Dr. Grigson's testimony. The decision of the Fifth Circuit that Mr. Smith's Due Process and Eighth Amendment rights may not be denied on grounds of procedural forfeiture clearly cannot be deemed "plain error" within the meaning of Rule 40.1(d)(2).

II

The Fifth and Sixth Amendment rights recognized by the court of appeals are appropriate within the context of the capital sentencing trial conducted in this case.

Under Texas law the State has the burden of proving probable future dangerousness beyond a reasonable doubt in order to secure a death sentence. Yet the State here sought to meet that burden through the defendant's own statements, unwittingly made without the slightest awareness that he would be assisting the State's effort to take his life.

The court of appeals documented that this is not an isolated case, but rather one of a long series of cases in which Texas prosecutors have relied upon the testimony of this very doctor, obtained in this very manner, to secure death sentences. The court of appeals was fully justified in determining that a Texas capital defendant faced with this practice has a right to decide for himself, after being warned of his right to remain silent and after receiving the guiding advice of counsel, whether or not to submit to an examination by a psychiatrist whose testimony might later be used to seek his execution.

The State's grounds for challenging this holding of the court of appeals are unpersuasive. It is repugnant to the Fifth Amendment to hold that a man facing trial for his life may be compelled to provide from his own lips the very evidence which the State will use to execute him. Such compulsion is not rendered less repugnant in the context of the sort of psychiatric interview at issue here. In light of the use to which it was put, Dr. Grigson's interview was hardly a routine competency examination, having only the benign and neutral purpose of insuring that the criminal defendant understands the charges and is capable of assisting in his defense. Nor

was it a routine sanity examination, occasioned by the defendant's own claim of insanity, where the defendant's silence might deprive the State of the only genuine means of meeting such a claim. Here the State had the burden of proving Mr. Smith's alleged future dangerousness beyond a reasonable doubt. The State may not satisfy that burden by compelling the defendant to speak with a psychiatrist who will then recommend whether or not he is fit to live.

The safeguards required by the court of appeals to protect the Fifth Amendment privilege are fully appropriate. The warnings that a capital defendant has the right to remain silent, and that anything said can be used against him in a court of law, are basic and fundamental. Because Mr. Smith had been indicted and counsel assigned to represent him long before the Grigson interview, the court of appeals properly held that he had a Sixth Amendment right to the assistance of counsel in deciding whether or not to speak with the doctor.

The State's claim that Mr. Smith's Fifth Amendment rights should be ignored because his trial lawyer did not couch his objection to Dr. Grigson's testimony in specific Fifth Amendment terms was not raised in the certiorari petition. Accordingly, it is not properly before the Court. Furthermore, the State waived any claim of procedural forfeiture in the district court below. The court of appeals correctly found no merit to the State's claim of procedural default, and that determination is not "plain error" under Rule 40.1(d)(2).

III

The court of appeals properly affirmed the district court's determination to grant habeas corpus relief on the basis of the state trial record and the affidavits submitted by both sides. The trial record alone gave the district court ample basis to conclude that the prosecution had used Dr. Grigson as a surprise witness. The affidavits requested by the district court revealed no material dispute of fact concerning respondent's claim of surprise.

ARGUMENT

I

The Prosecution's Deliberate Use Of Doctor Grigson As A Surprise Witness At The Penalty Trial In This Capital Case Deprived Respondent Of Due Process Of Law And Resulted In The Imposition Of Cruel And Unusual Punishment

A.

The circumstances under which Dr. Grigson emerged as a surprise witness at the very end of the penalty trial have been set forth above, and need not be recounted in detail here. It suffices to say that this case is before the Court upon affirmed findings of fact that the Dallas prosecutors (1) "intentionally omitted Dr. Grigson's name from the witness list" and (2) "were deliberately attempting to surprise the defense attorneys

and to force them to examine Dr. Grigson while they were unprepared." *Smith* v. *Estelle, supra,* 602 F.2d at 702-03; CA. 16, 17. Defense counsel, relying upon the trial judge's order barring the testimony of any witness not listed by the prosecution at its case in chief, A. 9, were caught completely unawares. The consequences for Ernest Benjamin Smith, Jr. were "devastating." 602 F.2d at 699; CA. 10.

The state attempts before this Court to distort the facts, claiming in its Statement of the Case that Dr. Grigson "did not know he would be testifying until that day [*i.e.,* the day of his testimony] at approximately 2:30 p.m." (Br. Pet. at 19). This palpably false statement is repeated in the Summary of Argument: "the psychiatrist did not know he would testify until approximately 2:30 p.m. on the day he was called" (Br. Pet. at 15-16). Not until the Argument does the State finally disclose the truth: that although Dr. Grigson did not know until 2:30 p.m. on the day of his testimony (Tuesday, March 26, 1974) that he would be called *on that particular day,* the prosecutor's request that he testify had been made several days earlier (Br. Pet. at 22). The doctor's actual testimony is as follows:

> Q. When did he tell you that you would be called to testify?
>
> A. Let's see. I only knew I was testifying today about—let's see—1:45. No, must have been about 2:30. I had seen Mr. Mulder last Thursday, and he said that they had selected a jury and that they were putting on the trial and would probably need me to testify some time this week.

A.15.

> Q. Did he ever indicate that you would be called to testify?
>
> **A. Yes. Last Thursday, certainly he said that it looked like, you know, they were getting a jury, and he would probably need me to testify this week.**

Ibid. Here and elsewhere on *voir dire,* the doctor repeatedly admitted that the prosecution had asked him in advance to testify, A. 15-16, and that he had discussed his findings in advance with the prosecution, A. 14, 15. The record could not be clearer.

The State next implies that defense counsel should have known that the doctor would testify, despite the deliberate withholding of his name by the prosecution. Br. Pet. at 22-23. But the record establishes that defense counsel, shortly after learning from the court file that Dr. Grigson had been to see Mr. Smith, secured an order barring the prosecution from calling in its case in chief any individual not named on the prosecution's witness list. A. 9. Once the trial judge had signed that order, counsel had every right to assume that Dr. Grigson could not possibly be a factor in the case unless the defense presented the prosecution with some legitimate occasion to call a psychiatrist in rebuttal—as, of course, it did not. The courts below were therefore entirely correct in finding that Dr. Grigson's testimony surprised defense counsel.[40]

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[40] The State suggests that Mr. Smith's trial attorneys should have known that Dr. Grigson would testify because of their encounter with the doctor in another case tried the previous month. Br. Pet. at 23 n.3. This argument cannot be taken seriously; for, whatever

The only conceivable justification for permitting Dr. Grigson to testify despite the trial court's order would be that the doctor had been called as a *bona fide* rebuttal witness. But that untenable claim was not even advanced at trial; and despite its subsequent acceptance by the Texas Court of Criminal Appeals (540 S.W.2d at 699; A. 45), it has since been abandoned by the State. 602 F.2d at 703 n. 12; CA. 17. In its place, the State now offers nothing but a convoluted and distorted analysis of the record. The State had every opportunity in the district court to present the explanations of the trial prosecutors themselves; yet not once have they come forward and denied that they intentionally withheld notice of Dr. Grigson's testimony in a deliberate effort to surprise defense counsel.

It is now settled that in capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner* v. *Florida,* 430 U.S. 349, 358 (1977) (plurality opinion). See also *Green* v. *Georgia,* 442 U.S. 95, 97 (1979); *Presnell* v. *Georgia,* 439 U.S. 14, 16 (1978); *Witherspoon* v. *Illinois,* 391 U.S. 510, 522 n.20 (1968). It is equally well established that the difference between death and all other criminal sanctions "calls for a greater degree of reliability when the death sentence is

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may have been their experience with Dr. Grigson in earlier matters, counsel surely had a right to rely on the trial judge's order barring his testimony in *this* case. But, in any event, the trial record of the case cited by the State reveals that Dr. Grigson testified there in response to the defendant's claim of insanity—a far more routine appearance in a far more traditional context. *State* v. *Hovila,* Cause No. C-74-465 QM, 194th Jud. Dist. Ct., Dallas Co., Tex.

imposed." *Lockett* v. *Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion). See also *Gardner* v. *Florida, supra,* 430 U.S. at 359 (plurality opinion); *id.* at 363-64 (concurring opinion of Mr. Justice White); *Woodson* v. *North Carolina,* 428 U.S. 280, 305 (1976) (plurality opinion). As the courts below recognized, no intelligible meaning of these principles could permit a prosecutor in a death case to employ a palpable ruse as a means of avoiding effective cross examination and rebuttal of the highly impeachable psychiatric predictions of a highly impeachable expert witness, which the prosecutor has put forward as the exclusive basis for convincing the jury that the defendant is not fit to live.

But that is precisely what the prosecutors did here. On the basis of one 90-minute interview, Dr. Grigson was called as a surprise witness to testify that Ernest Benjamin Smith has "a sociopathic personality disorder" (A. 23), "would have to be way down to the very severe end—at the very end" of the scale of sociopaths (A. 24), that "he will continue his previous behavior . . . He will do it again in the future" (A. 24), that his behavior, "[i]f anything . . . would only get worse" (A. 24; see also A. 25), that "Mr. Smith does not have any regard for another human being's property or for their life, regardless of who it may be " (A. 25), that "[t]here is no treatment, no medicine. Nothing that's going to change this behavior" (A. 25), and that "certainly Mr. Smith is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so" (A. 26). These unqualified, remarkably

confident predictions of future homicidal conduct on the part of Mr. Smith—who did not himself kill anyone in the felony-murder of which he stood convicted, and whose entire past criminal record consisted of a single marijuana offense resulting in probation—were laid before the sentencing jury in a manner calculated to deprive Mr. Smith of the least opportunity to demonstrate their fundamental unreliability.

Only last Term, this Court recognized that, "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis," there is a "serious question" as to whether such a diagnosis can ever establish future dangerousness beyond a reasonable doubt. *Addington* v. *Texas,* 441 U.S. 418, 429 (1979). For "[p]sychiatric diagnosis . . . is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient." *Id.* at 430. Nevertheless, Texas law *does* require a finding of future dangerousness to be made beyond a reasonable doubt in order to support a death sentence, Tex. Code Crim. Pro. Art. 37.071(c); Dr. Grigson *did* offer the most "definite conclusions" about the future dangerousness of Ernest Benjamin Smith, Jr.; and, by a blatant prosecutor's trick, Mr. Smith's sentencing jury was denied even the cautionary insights expressed in this Court's *Addington* opinion.

The consequences of the prosecutor's trick were to defeat both the fairness required by Due Process and the

reliability demanded by the Eighth Amendment "in the determination that death is the appropriate punishment in [this] . . . specific case." *Woodson* v. *North Carolina, supra,* 428 U.S. at 305 (plurality opinion). The opinions below set forth abundant authority for the proposition that Dr. Grigson's prediction of future dangerousness was strongly suspect—authority that could have been mustered in Mr. Smith's behalf, through either cross examination or the testimony of a competent defense expert psychiatrist, had defense counsel known that Dr. Grigson would testify. 602 F.2d at 699-701 n.7, CA. 10-13; 445 F.Supp. at 655-57, A. 134-38. One respected commentator, in an article devoted exclusively to this case, has stated that Dr. Grigson's testimony "stood—generously analyzed—at the fringes of professional acceptability" and placed the doctor "at the brink of quackery." Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics,* 5 Am. J. Crim. L. 151, 172 (1977). The American Psychiatric Association's Task Force on Clinical Aspects of the Violent Individual has concluded that psychiatric predictions of future dangerousness "are fundamentally of very low reliability." *Clinical Aspects of the Violent Individual* 23 (1974). The Task Force concluded that

> [p]sychiatric expertise in the prediction of "dangerousness" is not established and clinicians

> should avoid "conclusory" judgments in this regard.

Id. at 33.[41] The opinions below also set forth substantial documentation of Dr. Grigson's particular proclivity to make findings of sociopathy and to predict future dangerousness from them, and of his ready willingness to draw broad and confident conclusions as an expert witness for the prosecution. 602 F.2d at 700-01 n.7, CA. 12-13; 445 F.Supp. at 653 n.7, A. 129-30. See pp. 64-67 *infra.* This evidence could also have been placed before the sentencing jury but for the prosecution's tactics.

A capital trial is hardly "a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams* v. *Florida,* 399 U.S. 78, 82 (1970). Yet in this case, the prosecution treated the penalty phase in precisely that manner. When a man is on trial for his life, the State may not engage in "cloak and dagger" techniques designed to minimize impeachment of inherently unreliable testimony. *Riggs* v. *United States,* 280 F.2d 750, 754 (5th Cir. 1960). See also *Giglio* v. *United States,* 405 U.S. 150, 153-54 (1972), and authorities cited therein.

The State notes that there is no general constitutional right to discovery in criminal cases. *Weatherford*

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[41] The American Psychiatric Association filed an *amicus curiae* brief in the court of appeals, discussing this point in considerable detail and urging affirmance of the district court's decision. See 602 F.2d at 699-700 n.7; CA. 10-11. The APA appears as *amicus curiae* again before this Court.

v. *Bursey,* 429 U.S. 545 (1977). That is true but it is also irrelevant to the issue now before the Court. The issue here is not whether a criminal defendant has the general right to advance notice of the witnesses against him—or the far narrower right to advance notice of a medical expert witness[42] who has obtained pretrial discovery *from* the defendant by interviewing him without notice to his lawyer. The issue is not even whether a defendant facing the death penalty ought to have such rights.[43] The issue is whether a capital defendant who has been *granted* advance notice of the witnesses against him by the trial judge, and has *relied* upon that notice, may be executed on the basis of highly suspect testimony presented in violation of the notice requirement and thereby insulated against rejoinder or truth-testing criticism. We submit that plainly he may not. "[A]lthough the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded,. . . it does speak to the balance of forces between the accused and his accuser." *Wardius* v. *Oregon,* 412 U.S. 470, 474 (1973). Here that balance was distorted to Mr. Smith's irreparable disadvantage by a prosecutor's stratagem.

The State further argues that because Dr. Grigson's testimony was presented not in secret but in open court,

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[42] See opinion of the district court, 445 F.Supp. at 655; A. 133: "It is impossible for even the best lawyers to effectively cross examine a medical expert without any preparation."

[43] *Cf.* 18 U.S.C. § 3432. See generally *Logan* v. *United States,* 144 U.S. 263, 304-08 (1892). Compare, *Quinones* v. *State,* 592 S.W. 2d 933, 947 (Tex. Crim. App. 1980) (Roberts, J., dissenting); *Id.* at 949 (Odom, J., dissenting).

the facts of this case "distinguish it from the holding in *Gardner* v. *Florida, supra,* and more closely align it with the fact situation in *Williams* v. *New York*, 337 U.S. 241 (1949)." Br. Pet. at 19. But Dr. Grigson's testimony was a secret until literally moments before he took the stand. Because of the prosecution's tactics, defense counsel was left with no meaningful opportunity to question the doctor's readily assailable conclusions. As the court of appeals observed:

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the "opportunity for [defense] counsel to challenge the accuracy or materiality of" evidence, *Gardner* v. *Florida,* 430 U.S. at 357 . . ., and in foreclosing "that debate between adversaries [which] is often essential to the truth-seeking function of trials," *id.* at 360 . . .

602 F.2d at 699; CA. 9.

More significantly, *Gardner* was decided upon a far broader basis than a hairline distinction between its facts and the facts of *Williams.* The prevailing opinion in *Gardner* observed that during the 30 years since *Williams,* "this Court has acknowledged its obligation to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society," 430 U.S. at 357, and stated:

> In 1949, when the *Williams* case was decided, no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this Court . . . In the intervening years there have been two constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949.

> First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. [citations omitted] . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
>
> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *Mempa* v. *Rhay,* 389 U.S. 128; *Specht* v. *Patterson,* 386 U.S. 605. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence . . .

Id. at 357-58.

The character of the procedure under which Ernest Benjamin Smith, Jr. was condemned to die was grossly defective, even by standards less exacting than those demanded when life is at stake. *Cf. Townsend* v. *Burke,* 334 U.S. 736 (1948). Because of the prosecution's tactics, "[t]he *Smith* case went to the penalty jury without full development of virtually all the important aspects of the psychiatric testimony," leaving Mr. Smith to be sentenced to death upon "incomplete and misleading"

evidence. Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics, supra,* 5 Am. J. Crim. L. at 212-13. Both the Due Process Clause and the Eighth Amendment "[command] that no such practice as that disclosed by this record shall send any accused to his death." *Chambers* v. *Florida,* 309 U.S. 227, 241 (1940).

B.

The State next argues at length that Due Process was not violated by the *nature* of the psychiatric testimony. Br. Pet. at 24-30. We are at a loss to fathom the reasons why this argument is made. Although Mr. Smith pleaded in his habeas corpus petition that Dr. Grigson's testimony was too unreliable to form a constitutionally adequate basis for his death sentence, A. 70-71, and requested an evidentiary hearing on that question, A. 104, the district court never decided the issue.[44] The district court did, however, comment in *dictum* that psychiatric testimony of this sort should *not* "be excluded per se" from capital trials. 445 F.Supp. at 657; A. 138. Similarly, the court of appeals did not come near holding such testimony inadmissible; it merely noted the obvious fact that, in approving the Texas death-sentencing scheme, this Court had envisioned a broad sentencing inquiry rather than a narrow battle of psychiatric experts. 602 F.2d at 705-06; CA. 22-25.

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[44] As noted previously (see n.32, *supra*), the district court chose not to reach several issues pleaded by Mr. Smith, and those issues remain open for future adjudication if necessary. 445 F.Supp. at 664; A. 152.

The issue before the Court on this record in not whether Dr. Grigson's confidence concerning the ability of psychiatrists to predict future dangerousness — or the skepticism of the majority of his profession — is correct. The issue is simply whether there was a fair opportunity for the jury to hear both sides. The affirmed findings of fact establish that the prosecution's tactics deprived Mr. Smith of any meaningful chance to present the case against Dr. Grigson's position. As the district court observed:

> [w]hen the state introduces psychiatric testimony on dangerousness at the punishment phase of a capital trial the defense must have a fair opportunity to cross examine that testimony and rebut it with expert testimony on behalf of the defendant. When that fair opportunity is denied the defendant, as it was here, our adversary system breaks down and a man is unjustly sentenced to die.

445 F.Supp. at 657; A. 138.

It may be that the State, in arguing that "[the] evidence supports both the verdict and the analysis of the psychiatrist" (Br. Pet. at 28), is in some indirect fashion attempting to imply that Dr. Grigson's testimony constituted harmless error. If so, that effort plainly must fail. Dr. Grigson was the only witness for the State at the penalty phase. On appeal to the Texas Court of Criminal Appeals, the State relied exclusively upon his testimony to support the death sentence. See note 23, *supra;* A. 49; 445 F.Supp. at 663 n. 31, A. 150. Obviously, Mr. Smith's one prior conviction for possession of marijuana and his subsequent unemployment would not establish his propensity to commit future violent criminal acts. See p. 13 & n.15, *supra.* See also

Black, *Due Process for Death: Jurek* v. *Texas and Companion Cases,* 26 Catholic U.L. Rev. 1, 14-16 (1977). And, as demonstrated in our Statement of the Case, the State's description of the crime itself is nearly as misleading as its analysis of the facts surrounding Dr. Grigson's testimony. See pp. 7-11, 13-14, *supra.*

Clearly, Dr. Grigson's opinions were by far the most damaging evidence against respondent on the issue of sentence. Indeed, they were the only prosecution evidence at trial directed specifically to the question posed by Tex. Code Crim. Pro. Art. 37.071 (b)(2). As a matter of Texas law, the erroneous admission of far less damaging and central evidence at the penalty phase of a capital trial has been held prejudicial and reversible. See *Cortez* v. *State,* 571 S.W.2d 308 (Tex. Crim. App. 1978) (introduction of improperly authenticated 1954 and 1960 convictions for auto larceny not harmless, even though the prosecution had established more recent convictions for more serious crimes and had also presented psychiatric testimony as to the defendant's probable future dangerousness). And as a matter of federal constitutional law, it is inconceivable that the admission of Dr. Grigson's testimony could be deemed harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18 (1967).

C.

Finally, the State urges that despite defense counsel's vigorous contemporaneous objection to Dr. Grigson's testimony, A. 16-17, counsel's failure to move for a continuance constituted a procedural default under Texas law barring consideration of the Due Process and Eighth Amendment claims. Br. Pet. at 30-32. This issue was not raised in the certiorari petition, and therefore should not be considered by the Court. See Rule 40.1 (d) (2), recodified as Rule 34.1(a) (eff. June 30, 1980). Indeed, the issue has *never* been raised by the State at any time in this case prior to its brief in this Court; even the State's own Statement of the Case reflects that the "contemporaneous objection" argument which it advanced on rehearing in the district court and on appeal to the Fifth Circuit referred solely to the Fifth and Sixth Amendment issue in this case. Br. Pet. at 14-15. (That contemporaneous objection argument was also abandoned in the certiorari petition, although the State now seeks to resurrect it.) See also Fifth Circuit Brief for Appellant Estelle, pp. 25-26; Petition for Rehearing En Banc, pp. 8-9.[45]

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[45] Although the State did not argue before the court of appeals that defense counsel had committed a procedural default under Texas law on this question, the court nonetheless chose to analyze the subject in a footnote to its opinion. 602 F.2d at 701 n.8; CA. 13-14. We submit that the grounds enumerated there are more than adequate to meet any claim of procedural forfeiture.

In its brief in the court of appeals, the State cited "no rule of Texas law saying that moving for a continuance is the only way to object to surprise." 602 F.2d at 701 n.8; CA. 13. In its brief in this Court the State has attempted to muster such authority, relying upon state-law cases decided in 1931, 1919, and 1912 (Br. Pet. at

In any event, the Texas Court of Criminal Appeals did not impose any rule of procedural default in deciding the issue of surprise in this case. It ruled on the merits, holding that Dr. Grigson was a rebuttal witness. 540 S.W.2d at 699; A. 45. This Court has consistently declined to find procedural defaults where the State courts, rather than invoking rules of procedural forfeiture, have addressed issues on the merits. See *Payton* v. *New York*, _____ U.S. _____, 48 U.S.L.W. 4375, 4378 n. 19 (April 15, 1980); *Ulster County Court* v. *Allen*, 442 U.S. 140, 153-54 (1979); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976). Cf. *Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975). The rule of those cases controls here.

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31). However, in at least one less antiquated case, the Texas Court of Criminal Appeals has indicated that an objection would be sufficient. *Thompson* v. *State*, 537 S.W.2d 732, 736 (Tex. Crim. App. 1976). See also *Hubbard* v. *State*, 496 S.W.2d 924, 926 (Tex. Crim. App. 1973) (procedural forfeiture for failing to "object *or* request a continuance") (emphasis added). And in four other recent cases, that court has entertained claims of surprise without reflecting that a continuance was requested. *Green* v. *State*, 510 S.W.2d 919, 921 (Tex. Crim. App. 1974); *Lincoln* v. *State*, 508 S.W.2d 635, 637 (Tex. Crim. App. 1974); *Clay* v. *State*, 505 S.W.2d 882, 885 (Tex. Crim. App. 1974); *Hoagland* v. *State*, 494 S.W.2d 186, 188-89 (Tex. Crim. App. 1973).

Certainly, on review of the unanimous decision of the court of appeals, that court's determination to reject any supposed inadequacy in defense counsel's strenuous contemporaneous objection to Dr. Grigson's testimony can hardly be deemed "plain error" requiring reversal. See Rule 40.1(d)(2).

II

The Fifth And Sixth Amendment Rights Recognized By The Court Of Appeals Are Appropriate Within The Context Of The Capital Sentencing Trial Conducted In This Case, Where The State Had The Burden Of Proving Respondent's Alleged Probable Future Dangerousness As The Basis For A Death Sentence Yet Sought To Meet That Burden Through Respondent's Own Statements

The court of appeals reached a narrow set of Fifth and Sixth Amendment issues in this case, in view of the likelihood that they would arise "[i]f Texas retried [Mr.] Smith . . ." 602 F.2d at 703 n.13; CA. 18. We believe that the issues should be decided for this reason, although it is not strictly necessary to reach them because the Eighth and Fourteenth Amendment grounds set forth above suffice to establish Mr. Smith's right to relief from his present death sentence.

On the other hand, this case does not present an appropriate occasion to conduct the kind of wide-ranging canvass of the role of the Fifth and Sixth Amendments in all sorts of psychiatric examinations connected with the criminal process which the State's brief proposes. (See Br. Pet. at 35-37.) Notably, the State cites a Fifth Circuit case, *United States* v. *Cohen,* 530 F.2d 43 (5th Cir. 1976), foremost among the many that

have dealt with the various problems arising from court-ordered psychiatric examinations for the purposes of "proof of sanity at the time of the offense or competency to stand trial" (Br. Pet. at 36). The court of appeals below accepted *Cohen* as the law, but found — correctly, as we note at pp. 74-76 *infra* — that the sort of issue presented there was vastly different from the one peculiar to this case. 602 F.2d at 704-05; CA. 20-22. Focusing on the circumstances revealed by this record and the unique use of psychiatric evidence involved when the prosecution undertakes to prove allegations of probable future dangerousness at a Texas death-penalty trial conducted under Tex. Code Crim. Pro. Art. 37.071(b)(2), the court held specifically that

> at the sentencing phase of a capital trial, Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination [although the defendant had no right to the presence of counsel during the examination itself, see 602 F.2d at 708; CA. 28-29].[46]

Id. at 709; CA. 30.

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[46] See also *Schantz* v. *Eyman*, 418 F.2d 11, 13-14 & n.8 (9th Cir. 1969). The right to the presence of counsel during a psychiatric examination, see *Larsen* v. *Illinois*, _____ U.S. _____, 62 L.Ed. 2d 143 (1979) (opinion of Mr. Justice White, dissenting from the denial of certiorari), is not at issue in this case. [Footnote added.]

These rights were tailored to the particular situation disclosed by the present record and by other realities which the court of appeals could judicially notice. The basic facts are stark and simple. On February 18, 1974—more than two months after indictment, A. 1, 125, Tr. 4-5, and almost four months after the appointment of counsel to represent Ernest Benjamin Smith, Jr., Tr. 5—Mr. Smith was visited in the Dallas County Jail by Dr. James P. Grigson. Mr. Smith spoke with Dr. Grigson for approximately ninety minutes, according to the doctor's recollection. A. 27, 30. In that brief period of time—during which Mr. Smith co-operated fully with Dr. Grigson, A. 29, 31, 32—this defendant with his life at stake unknowingly gave the prosecution the basis for the only testimony offered against him at his subsequent penalty trial. Mr. Smith was not advised that the interview could have any adversarial purpose, or that his comments to Dr. Grigson could and would be used by the prosecution to take his life; and he was not advised that, in view of that awesome consequence of the interview, he had a right not to speak with the doctor, and to consult the attorney assigned to represent him before deciding whether to speak with Dr. Grigson or not.

As it did below, the State now seeks to portray this confrontation as benign. "The psychiatrist was court-appointed to examine the mental status of Smith. He was not acting as an agent of the State to obtain self-incriminating evidence by subterfuge or trickery. His conclusions were available to both parties." (Br. Pet. at 35.) The court of appeals took a more realistic view of

the matter. When it observed, in explanation of its Fifth Amendment holding, that "[o]nly defendants who do not know better will allow themselves to be examined by psychiatrists antecedently favorable to the state," 602 F.2d at 708; CA. 27, and, in explanation of its Sixth Amendment holding, that the question whether to submit to a psychiatric examination that is "literally a life or death matter . . . is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections," etc., *id.* at 708; CA. 29, the court of appeals was responding to something far more specific than the decorous abstractions about "[a] psychiatric examination" or "a mental examination" (Br. Pet. at 36) in which the State now seeks to cloak this case.

The fact is, as the court of appeals noted, that "even in reported, appellate cases, Dr. Grigson has repeatedly testified for the state." 602 F.2d at 700 n.7; CA. 12. Indeed, by his own admission, Dr. Grigson has testified as a witness for the prosecution at the penalty phase in at least 50 Texas capital cases. See *The American Lawyer,* Nov. 1979, p. 25; *Dallas Times Herald,* Sept. 30, 1979, p. 1. Including this case, he has testified for the State in a dozen death cases decided by the Texas Court of Criminal Appeals to date. See *Barefoot* v. *State,* 596 S.W.2d 875, 887-88 (Tex. Crim. App. 1980); *Simmons* v. *State,* 594 S.W.2d 760, 765 (Tex. Crim. App. 1980); *Brandon* v. *State,* _____ S.W.2d _____, No. 59,348 (Tex. Crim. App. April 25, 1979); *Adams* v. *State,* 577 S.W.2d 717, 731 (Tex. Crim.

App. 1979); *Chambers* v. *State,* 568 S.W.2d 313, 324-26 (Tex. Crim. App. 1978);[47] *Anderson Hughes* v. *State,* 562 S.W.2d 857, 863-64 (Tex. Crim. App. 1978); *Eddie Lee Robinson* v. *State,* 548 S.W.2d 63, 65 (Tex. Crim. App. 1977); *Collins* v. *State,* 548 S.W.2d 368, 377-78 (Tex. Crim. App. 1976); *Gholson* v. *State* and *Ross* v. *State,* 542 S.W.2d 395, 400-01 (Tex. Crim. App. 1976);[48] *Moore* v. *State,* 542 S.W.2d 664, 676 (Tex. Crim. App. 1976); *Livingston* v. *State,* 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976). Yet

> [h]e has not appeared in the report of any case as a witness for the defense. On many occasions he has declared that a person he examined was a sociopath or was otherwise likely to commit crimes in the future . . . [Citations omitted.] Frequently he reached this conclusion after he was assigned to examine only for competence or sanity . . . [Citations omitted.] We dealt with Dr. Grigson's testimony in *Bruce* v. *Estelle,* 536 F.2d 1051 (5th Cir. 1976). There a habeas corpus petitioner claimed that he had been incompetent to stand trial. Dr. Grigson testified that the petitioner had been competent and was in fact a sociopath, whose apparent symptoms of incompetence were actually part of an attempt to manipulate others. The federal district court relied on Dr. Grigson's testimony and denied relief. We

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[47] In *Chambers* Dr. Grigson testified that: "[m]y profession doesn't state that I've got to wait until he kills twenty people before I can call him a sociopath." 568 S.W.2d at 326. When asked by defense counsel why another examination of the defendant was unnecessary, the doctor responded: "I don't need to see him again and put my life in jeopardy." *Ibid.* And the doctor described the defendant as a " 'cancerous type person' who should be removed from society." *Ibid.*

[48] Federal habeas corpus relief has been granted in this case pursuant to the Fifth Circuit's decision herein. *Gholson and Ross* v. *Estelle,* _____F.Supp._____, Civil Action No. W-78-CA-68 (W.D. Tex. Oct. 30, 1979).

> reversed, holding that the reliance on Dr. Grigson's testimony was clear error in view of other psychiatrists' views and their bases.

602 F.2d at 701 n.7; CA. 12-13.[49] This was the setting in which the court of appeals found it constitutionally vital that a Texas capital defendant have the right to decide for himself, after receiving the guiding advice of counsel, whether or not to submit to examination by a particular psychiatrist whose testimony might later be used to deprive him of his life. See 602 F.2d at 708-09; CA. 27-30.

We turn to the State's grounds for challenging this modest and eminently sensible conclusion.

A.

The State first asserts that Mr. Smith had "no [Fifth Amendment] privielge [*sic*] to be violated" (Br. Pet. at 35) because Dr. Grigson's testimony was used only to impose sentence following conviction, not to establish guilt. See Br. Pet. at 32-35. This argument would be irrelevant to the facts of the present case even

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[49] More particularly, the court in *Bruce* found reliance upon Dr. Grigson's testimony to be clearly erroneous in that his findings were "discredit[ed]" by "extensive medical and lay evidence" to the contrary; the court rejected the doctor's assertion that he was simply "better qualified" to determine Bruce's condition than the other experts consulted. 536 F.2d at 1061. And the Texas Court of Criminal Appeals recently held in a non-death case that Dr. Grigson's testimony for the prosecution had been "so inflammatory and misleading that it deprived appellant of a fair determination on the issue of competency." *Callaway* v. *State,* 594 S.W.2d 440, 443 (Tex. Crim. App. 1980).

if it were correct;[50] but it is so manifestly incorrect that we believe it should be met head on. Having enacted a statute which provides that a person convicted of capital murder shall be sentenced to death if but only if certain additional facts are proved beyond a reasonable doubt by the prosecution, Texas is now asking this Court to hold that no Fifth Amendment privilege attaches to those facts—*i.e.*, that a man facing trial for his life may be *compelled* to provide from his own lips the evidence that the State will use to prove those facts and thus to kill him. Such a proposition manifestly cannot be squared with a constitutional privilege whose "sole concern is to afford protection against being 'forced to give

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[50] The argument would be relevant only if Dr. Grigson had *examined Mr. Smith after conviction* but before sentence. That is apparently the point in time of which the State speaks when it says that "incrimination is complete once guilt has been adjudicated" (Br. Pet. at 33). But of course Dr. Grigson examined Mr. Smith before trial of *either* the issue of guilt *or* the issue of penalty. At that time, Mr. Smith plainly had a Fifth Amendment privilege to refuse to answer potentially incriminating questions asked of him by any agent of the state *in any setting*—civil, criminal, administrative, investigative or otherwise, see, *e.g.*, *Malloy* v. *Hogan*, 378 U.S. 1, 11 (1964); *Kastigar* v. *United States*, 406 U.S. 441, 444 (1972); *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973); *Maness* v. *Meyers*, 419 U.S. 449, 463-65 (1975); *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 805 (1977)—unless he was protected by an appropriate order barring the use of his answers for incrimination *before* they were compelled. (The latter kind of protection might be given as in the case of pretrial psychiatric examinations to determine competency to be tried or sanity at the time of the crime, where the information obtained by the examining psychiatrist is limited in its uses to the purpose for which the examination was ordered.) Here, no such protective order was in effect; and at the relevant time when potentially incriminating evidence was elicited from Mr. Smith by Dr. Grigson, it simply was not true that "incrimination [was] . . . no longer at issue" (Br. Pet. at 34).

testimony leading to the infliction of "penalties affixed to . . . criminal acts," ' " *Kastigar* v. *United States,* 406 U.S. 441, 453 (1972) [quoting *Ullman* v. *United States,* 350 U.S. 422, 438-39 (1956), which in turn quotes *Boyd* v. *United States,* 116 U.S. 616, 634 (1886)]—a protection which it gives "by assuring that . . . compelled testimony can in no way lead to the infliction of criminal penalties." *Kastigar* v. *United States, supra,* 406 U.S. at 461.

The cardinal principle of the Fifth Amendment "is the conviction, basic to our legal order, that men are not to be exploited for the information necessary to condemn them before the law . . ." *Culombe* v. *Connecticut,* 367 U.S. 568, 581 (1961) (opinion of Mr. Justice Frankfurter). The privilege "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' " *Ullmann* v. *United States, supra,* 350 U.S. at 426 (1956). "It reflects many of our fundamental values and most noble aspirations: . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; . . . our sense of fair play which dictates 'a fair state-individual balance . . . by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev, 1961), 317 . . ." *Murphy* v. *Waterfront Commission of New York,* 378 U.S. 52, 55 (1964).

The notion that these values are irrelevant to the punishment trial in a capital case is completely repugnant to this Court's view of both the Fifth Amendment

and the capital sentencing process. The privilege applies where a citizen "has reasonable cause to apprehend danger," *Hoffman* v. *United States,* 341 U.S. 479, 486 (1951), arising out of "future prosecutions," *Reina* v. *United States,* 364 U.S. 507, 514 (1960). "Prosecutions" in this sense have never been limited by this Court to proceedings seeking an adjudication of a person's *guilt* of a criminal offense; for almost a century, it has been held sufficient that the proceeding have as its object the imposition of "penalties affixed to . . . criminal acts." *Boyd* v. *United States,* 116 U.S. 616, 634 (1886).[51] Thus the reach of the Fifth Amendment "does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In Re Gault,* 387 U.S. 1, 49 (1967).

Under Texas law, the penalty trial is a separate proceeding at which the State has the burden of proving statutorily specified facts beyond a reasonable doubt in order to secure a sentence of death. Tex. Code Crim. Pro. Art. 37.071. This Court has consistently held that in any proceeding to enhance punishment, "the fundamental rights of the defendant with respect to the ascertainment of his liability to the increased penalty" must be fully protected. *Graham* v. *West Virginia,* 224

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[51] And, of course, Mr. Smith here invokes the privilege to protect himself against the use of statements obtained in a court-ordered psychiatric interview conducted *prior* to his sentencing proceeding. Reina, unlike Mr. Smith, was asking for the remission of a sentence already imposed. See *Reina* v. *United States, supra,* 364 U.S. at 513.

U.S. 616, 626 (1912); *Chandler* v. *Fretag,* 348 U.S. 3 (1954); *Reynolds* v. *Cochran,* 365 U.S. 525 (1961); *Chewing* v. *Cunningham,* 368 U.S. 443 (1962). A defendant is not stripped of his constitutional rights where the State, in order to obtain a more severe sentence, must persuade the jury to arrive at "a new finding of fact . . . that was not an ingredient of the offense charged." *Specht* v. *Patterson,* 386 U.S. 605, 608 (1967).

Nowhere is this principle more firmly established than with respect to a sentencing trial in which the defendant faces execution. "[F]undamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." *Presnell* v. *Georgia, supra,* 439 U.S. at 16 (1978). See also *Gardner* v. *Florida, supra,* 430 U.S. at 357-58 (1977) (plurality opinion); *Green* v. *Georgia, supra,* 442 U.S. at 97 (1979). Where the State seeks to take the life of one of its citizens, an action which "differs dramatically from any other legitimate state action," *Gardner* v. *Florida, supra,* 430 U.S. at 358, it may not be relieved of its obligation to observe our most basic constitutional values.

In this case, the State had the burden of proving that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Pro. Art. 37.071(b)(2). To hold that the State may meet this burden by compelling evidence from the mouth of the defendant would be anathema to the Fifth Amendment.

Common respect for the dignity of a man facing trial for his very life requires obedience to the Fifth Amendment's fundamental command: ". . . that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Culombe* v. *Connecticut, supra,* 367 U.S. at 582. Especially where the consequences of speaking may be one's own death, a capital defendant is entitled to the same protection accorded by the Fifth Amendment to all individuals: the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964).

B.

The State urges, however, that the Fifth Amendment is inapplicable here because Mr. Smith's communications to Dr. Grigson were non-testimonial in nature, and because the Fifth Amendment is generally inapplicable to psychiatric examinations. Br. Pet. at 36-37. In view of the unique nature of the type of psychiatric examination at issue in this case, these contentions are without merit.

Mr. Smith's conversation with Dr. Grigson at the Dallas County Jail cannot even arguably be analogized to giving a blood sample or a voice exemplar. As the court of appeals found:

> . . . Dr. Grigson's diagnosis of Smith rested principally on his conclusion that Smith showed no

> remorse; obviously Dr. Grigson drew that conclusion from the content of Smith's statements to him. Indeed, Dr. Grigson testified, on cross-examination, that the most important basis of his diagnosis was the account of the crime which Smith gave him during their interview. [A. 27-29]. Dr. Grigson accepted that account as accurate and drew his conclusions accordingly, [A. 28]; he also based his diagnosis on comments Smith made and failed to make while he was recounting the crime, [A. 27-29]. Plainly, then, Dr. Grigson—and therefore the prosecution, when it called him as a witness—used the content, not the non-testimonial aspects of Smith's statements.

602 F.2d at 704; CA. 20. See also opinion of the district court, 445 F.Supp. at 662; A. 148. Thus, the State's argument "stretches the rationale for the 'testimonial limitation' to its maximum," because the doctor has relied upon the content of "the accused's own statements regarding his conscious thoughts at the time of the acts." *McCormick on Evidence* 287 (2d ed. 1972). A communication is testimonial where "reliance is to be placed . . . [on the defendant's] consciousness of the facts and the operation of his mind in expressing it . . ." 8 Wigmore, *Evidence* § 2265 (McNaughton rev. ed. 1961).[52] Where, as here, the psychiatrist relied

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[52] In yet another way, the Fifth Amendment privilege is implicated by Dr. Grigson's reliance upon Mr. Smith's statement purportedly showing no remorse: "A psychiatrist's pretrial diagnosis of an accused as a sociopath or psychopath, based on his lack of remorse for the commission of an offense to which he has pleaded not guilty and of which he has not been convicted, is contrary to the traditional presumption of innocence, an 'axiomatic and elementary' principle of law, the enforcement of which 'lies at the foundation of the administration of our criminal law.' *Coffin* v. *United States,* 156 U.S. 432, 453 (1895)." *Gholson and Ross* v.

specifically on the content of the defendant's own statements, it is absurd to "analogize them to the mere exhibition of one's body." *Lee* v. *County Court of Erie County,* 27 N.Y. 2d 432, 439, 267 N.E.2d 452, 456, 318 N.Y.S.2d 705, 710 (1971).[53]

The State's analogy to competency examinations and sanity examinations is equally misplaced. In light of the use to which it was put, Dr. Grigson's interview was no routine competency examination, having only the benign and neutral purpose of insuring that a criminal defendant understands the charges and is capable of assisting in his defense. Nor was it a routine sanity examination, occasioned by a defendant's plea of insanity—a very different situation, in which the defendant's silence might deprive the State of the only effective means of meeting an issue which the defendant himself has interjected into the case. Indeed, the court of appeals noted several times that if the defendant affirmatively seeks to offer psychiatric testimony at the penalty phase, he may well be deemed to have waived his privilege and be required to submit to an examination by the prosecutor's psychiatrist. 602 F.2d at 705 & n. 15, 707; CA. 21, 22, 26. See also opinion of the district court, 445 F.Supp. at 663; A. 150-51.

Estelle, supra, _____ F.Supp. _____, Civil Action No. W-78-CA-68, slip op. at 6 (W.D. Tex. Oct. 30, 1979).

[53] Accordingly, the rule of such cases as *Holt* v. *United States,* 218 U.S. 245 (1910); *Schmerber* v. *California,* 384 U.S. 757 (1966); *United States* v. *Wade,* 388 U.S. 218 (1967); *Gilbert* v. *California,* 388 U.S. 263 (1967); *United States* v. *Dionisio,* 410 U.S. 1 (1973) and *United States* v. *Mara,* 410 U.S. 19 (1973), is simply not factually applicable here.

In this case the State—not the defendant—raised the issue of Mr. Smith's alleged future dangerousness. Under Texas law, the State had the burden of proving such dangerousness beyond a reasonable doubt in order to obtain a death sentence. Tex. Code Crim. Pro. Art. 37.071(b)(2) and (c). And the State sought to meet that burden exclusively through Mr. Smith's own statements, unwittingly made without the slightest awareness that he would be assisting the prosecution's efforts to take his life. It is in that unique context, and that context alone, that the court of appeals mandated Fifth and Sixth Amendment safeguards.[54]

Accordingly, this case has nothing to do with the application of the Fifth and Sixth Amendments and the dictates of *Miranda* v. *Arizona,* 384 U.S. 436 (1966), to psychiatry in general. Competency examinations can be conducted as normal—provided the results may not subsequently be used by the prosecution to seek the defendant's execution. Sanity examinations can be con-

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[54] Of the 37 jurisdictions with death penalty statutes, only two in addition to Texas require a finding of probable future dangerousness as a statutory precondition to imposition of a death sentence. Ore. Rev. Stat. § 163.116 (2)(b)(Supp. 1980); Rev. Code Wash. Ann. 10.94.020 (10)(Supp. 1980-81). Virginia requires either such a finding or, alternatively, a finding that the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.4 (C)(Supp. 1979). And Oklahoma lists probable future dangerousness as one of several aggravating circumstances that may be considered by the jury at the penalty phase. Okla. Stat. Ann. Tit. 21 § 701.12(7)(Supp. 1979-80).

To counsel's knowledge, Texas is the only state in which prosecutors have systematically relied upon psychiatric testimony to prove probable future dangerousness.

ducted as normal, and the view of most circuits (including the Fifth) that raising the defense of insanity waives the privilege will be left undisturbed.[55]

Nor will an affirmance here lend the slightest support to the creation of barriers against the civil commitment of mentally ill persons, for this Court has recently declared that "[i]n a civil commitment state power is not exercised in a punitive sense . . . [A] civil commitment proceeding can in no sense be equated to a criminal prosecution." *Addington* v. *Texas, supra,* 441 U.S. at 428. Given the nature and purposes of civil committment proceedings as defined by *Addington,* those proceedings are light-years away from the penalty phase of a capital case.

C.

The question remains whether the safeguards required by the court of appeals to protect the Fifth Amendment privilege in this unique setting, where a capital defendant's communications during a court-ordered psychiatric examination are sought to be used by the prosecution to meet its burden of proof of the

[55] See, *e.g., United States* v. *Weiser,* 428 F.2d 932, 936 (2d Cir. 1969); *United States* v. *Albright,* 388 F.2d 719, 724 (4th Cir. 1968); *United States* v. *Cohen, supra,* 530 F.2d at 47 (5th Cir. 1976); *United States* v. *Bohle,* 445 F.2d 54, 66-67 (7th Cir. 1971); *Pope* v. *United States,* 372 F.2d 710, 720-21 (8th Cir. 1967) (en banc), *vacated and remanded on other grounds,* 392 U.S. 651 (1968); *Karstetter* v. *Cardwell,* 526 F.2d 1144, 1145 (9th Cir. 1975). A number of state supreme courts have held likewise. See, *e.g., Lee* v. *County Court of Erie County, supra,* 27 N.Y.2d at 441, 267 N.E.2d at 457, 318 N.Y.S.2d at 712 (1971), and cases cited therein; *State* v. *Whitlow,* 45 N.J. 3, 11, 210 A.2d 763, 767 (1965).

facts necessary to condemn him to death, are appropriate constructions of the Fifth Amendment's command. We believe that they are fully appropriate, and fully supported by the decisions of this Court.

Ernest Benjamin Smith, Jr., was never told that he might die as a consequence of speaking to Dr. Grigson, *i.e.*, that his conversation with the doctor could be used at the penalty phase of his trial to seek his execution. And he was never told that, in view of that consequence, he had a right to remain silent. These circumstances completely denied him the benefit of the privilege because, as this Court has succinctly noted in another context, if a person "exposed to possible self-incrimination [is] . . . not advised of his right [he] . . . may be deprived of the opportunity to decide whether or not to assert the privilege." *Maness* v. *Meyers,* 419 U.S. 449, 467 (1975). *Cf. Schneckloth* v. *Bustamonte,* 412 U.S. 218, 237-40 (1973).

It was upon the same ground that *Miranda* v. *Arizona, supra,* required the two basic Fifth Amendment warnings that a person undergoing custodial police interrogation must be given: *first,* that he has a right to remain silent; *second,* that anything he says can be used against him in a court of law. See *e.g., Rhode Island* v. *Innis,* ____U.S.____, 48 U.S.L.W. 4506, 4508 (May 12, 1980).

> For those unaware of the privilege, the warning is needed simply to make them aware of it - the threshold requirement for an intelligent decision as to its exercise.

Miranda v. *Arizona, supra,* 384 U.S. at 468.

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system - that he is not in the presence of persons acting solely in his interest.

Id. at 469.

Notably, these two warnings were not seriously questioned by the *Miranda* dissenters. Mr. Justice Clark did not begrudge the defendant " . . . the traditional warning that he may remain silent and that anything he says may be used against him." *Id.* at 500.[56] Mr. Justice Harlan characterized such warnings as "minor obstructions" to law enforcement. *Id.* at 516. And Mr. Justice White similarly focused his criticism upon the superfluity of additional protection where the defendant already "has been plainly advised that he may remain completely silent," *id.* at 538; see also *Escobedo* v. *Illinois,* 378 U.S. 478, 499 (1964) (dissenting opinion of Mr. Justice White) ("Danny Escobedo knew full well that he did not have to answer").[57]

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[56] Indeed, there was some evidence that Ernesto Miranda himself had at least been told as much. *Id.* at 492 n.66.

[57] The essence of the warnings was, of course, given to the defendants in *United States* v. *Mandujano,* 425 U.S. 564 (1976), and *United States* v. *Washington,* 431 U.S. 181 (1977).

The truly controversial requirements of *Miranda*—the provision and warning of a right to counsel before criminal proceedings have been commenced, the provision and warning of a right to state-appointed counsel for indigents in the police station—are totally irrelevant to the present case. Here, a criminal proceeding had begun: Mr. Smith had been indicted and counsel had been appointed to represent him long before Dr. Grigson conducted the interview. Thus, the right to counsel recognized by the court of appeals has nothing to do with the "limited Fifth Amendment right to counsel" declared in *Miranda,* see 384 U.S. at 537 (dissenting opinion of Mr. Justice White), but is rather a Sixth Amendment right resulting from the "initiation of adversary judicial criminal proceedings" against Mr. Smith. *Moore* v. *Illinois,* 434 U.S. 220, 227 (1977) [applying the rule of *Kirby* v. *Illinois,* 406 U.S. 682, 689 (1972) (plurality opinion)]. See 602 F.2d at 709; CA. 29-30. As this Court held in *Brewer* v. *Williams,* 430 U.S. 387, 398 (1977):

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him. . .

The right to counsel "is indispensable to the fair administration of our adversary system of criminal justice" and has uniformly been guaranteed in capital cases "at the pretrial stage," *Brewer* v. *Williams, supra,* 430 U.S. at 398; see *Powell* v. *Alabama,* 287 U.S. 45, 57 (1932); *Hamilton* v. *Alabama,* 368 U.S. 52 (1961);

White v. *Maryland,* 373 U.S. 59 (1963), during any " 'critical period of the proceedings,' " *Massiah* v. *United States,* 377 U.S. 201, 205 (1964) [quoting *Powell* v. *Alabama, supra,* 287 U.S. at 57]; see, *e.g., Coleman* v. *Alabama,* 399 U.S. 1, 7 (1970). In this case, Dr. Grigson's fateful visit to Ernest Benjamin Smith, Jr., at the Dallas County Jail proved to be a literally vital stage of the proceedings; yet Mr. Smith never had the constitutionally guaranteed assistance of counsel in deciding whether to speak with the doctor. See *Spano* v. *New York,* 360 U.S. 315, 327 (1959) (concurring opinion of Mr. Justice Stewart).

As the court of appeals recognized, Mr. Smith then faced a decision that would "have a crucial effect on his trial," 602 F.2d at 709; CA. 30—to "a lay defendant, who is likely to have no idea of the vagaries of expert testimony and its possible role in a capital trial, . . . a hopelessly difficult decision," 602 F.2d at 708-09; CA. 29. That point could not be more forcefully demonstrated than it was here, where counsel's advice was necessary not merely in deciding whether to talk to a psychiatrist, but whether to talk to this particular psychiatrist, with his particular "biases and predilections," 602 F.2d at 708; CA. 29. For it is plain that Dr. Grigson was the most dangerous man in Texas for Mr. Smith to talk to at this critical stage, see pp.64-67 *supra,* no matter what Mr. Smith happened to say. Here the "subtle and suggestive questions [and] . . . techniques of a highly trained psychiatrist," *Leyra* v. *Denno,* 347 U.S. 556, 559 (1954), were united with a penchant for making

diagnoses of sociopathy and testifying for the prosecution at the penalty phase of capital cases. Nonetheless, Mr. Smith was deprived of the advice of counsel in his decision to put his life in Dr. Grigson's hands. "The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." *Tomkins* v. *Missouri*, 323 U.S. 485, 489 (1945). The court of appeals held nothing more than this; and the Fifth and Sixth Amendments demand nothing less. Just as "a prisoner is not 'to be made the deluded instrument of his own conviction,' 2 Hawkins, Pleas of the Crown (8th ed 1824), 595," *Culombe* v. *Connecticut, supra,* 367 U.S. at 581 (1961), neither may he be made the deluded instrument of his own execution.

D.

The State claims, finally, that Mr. Smith's Fifth Amendment rights should be ignored because his defense attorney at trial did not couch his objection to Dr. Grigson's testimony in specific Fifth Amendment terms. Br.Pet. at 37-38. As this issue is nowhere to be found in the certiorari petition, it should not be considered by the Court. See Rule 40.1(d) (2).

The State's conduct in briefing this question after devoting not a single word to it in the certiorari petition is consistent with its approach to the question in the courts below. In the district court, the State answered

the Fifth Amendment claim on the merits and sought a ruling of law in its favor on the constitutional issue. A. 95-96. Even after the district court requested and received an affidavit from Mr. Smith's trial attorney concerning his failure to frame a specific Fifth Amendment objection, A. 142, the State did not invoke any argument of procedural forfeiture by supplemental pleading, and did not even reply to counsel's affidavit. Clearly, the State hoped and sought to prevail on the merits of the Fifth Amendment issue.

The courts below properly held that under these circumstances, the State waived any objection on grounds of procedural default. 602 F.2d at 708 n.19, CA. 28; 445 F.Supp. at 659-60, A. 142-43. The State had an affirmative duty to plead that defense. See *Rinehart* v. *Brewer,* 421 F.Supp. 508, 511 (S.D. Iowa 1976), *aff'd* 561 F.2d 126, 129 (8th Cir. 1977). By seeking to prevail on the merits rather than pleading forfeiture, the State relinquished any claim to reliance upon the latter doctrine. See *Whiteley* v. *Warden,* 401 U.S. 560, 569 (1971); *LaRoche* v. *Wainwright,* 599 F.2d 722, 724 (5th Cir. 1979). It would be monstrous to hold Mr. Smith to a waiver of his constitutional rights in a death case, as the State now seeks to do on the ground that his attorney's timely and forceful trial-court objection to Dr. Grigson's testimony was cast upon an insufficiently broad ground, while relieving the State itself of the consequences of its own waiver of that contention, which it failed to raise in any shape or form at all prior to judg-

ment in the district court[58] and which it once again failed to raise in its certiorari petition.

In any event, the court of appeals correctly found ample basis for rejecting the State's claim of procedural default. 602 F.2d at 708 n. 19; CA. 28. Since the Texas courts have squarely ruled against the very Fifth Amendment claim advanced by respondent below,[59] a specific objection on those grounds would have been futile. *Rummell* v. *Estelle,* 587 F.2d 651, 653 (5th Cir. 1978) (en banc), *aff'd,* ____ U.S. ____, 63 L.E.2d 382, 386 n. 7 (1980). Furthermore, defense counsel did not seek to "sandbag" the trial judge but rather objected forcefully and made a record by conducting a *voir dire* examination of Dr. Grigson. The State has never claimed that Dr. Grigson did in fact warn Mr. Smith of his rights, or that counsel's failure to interpose a specific Fifth Amendment objection deprived the prosecution of an opportunity to make a record to that effect when

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[58] The State did not make its present forfeiture argument until its motion for a new trial under F.R.Civ.P. 59(a). At that belated stage of the proceeding, however, a party may not revoke its waiver of a legal defense and seek to present the defense for the first time as a new legal theory. Rule 59 motions may not be used to present "a new defensive theory which could have been raised during the original proceedings." *Grumman Aircraft Eng. Corp.* v. *Renegotiation Board,* 482 F.2d 710, 721 (D.C. Cir. 1973), *rev'd on other grounds,* 421 U.S. 168 (1975); see also *Rue* v. *Feuz Construction Co.,* 103 F.Supp. 499, 502 (D.D.C. 1952) (as a matter of public policy and orderly court administration, a party may not "gamble" on one legal theory only to raise another on a rule 59(a) motion); Moore, *Federal Practice* ¶ 59.07. Accordingly, the district court properly denied the State's motion. A. 154.

[59] See *Livingston* v. *State,* 542 S.W.2d 655, 662 (Tex. Crim. App. 1976).

memories were freshest. Compare, *Wainwright* v. *Sykes,* 433 U.S. 72, 88-89 (1977); *Roberts* v. *United States,* ____*U.S.* ____, 63 L.Ed.2d 622, 630 (1980). Indeed, the Fifth Amendment issue is before this Court on undisputed facts. 602 F.2d at 703; CA. 18. Thus, the State suffered no prejudice from the absence of a specific Fifth Amendment objection, and the policy reasons underlying *Sykes* are totally absent.

Under the circumstances present here, the State's claim of procedural default clearly is not "plain error" within the meaning of Rule 40.1(d)(2). Accordingly, the Court should not entertain that claim.

III

The Court Of Appeals Correctly Affirmed The District Court's Decision To Grant Habeas Corpus Relief Based Upon The State Trial Record And Affidavits Submitted By Both Sides, Because The Record And Affidavits Did Not Reveal Any Material Dispute Of Fact Necessitating An Evidentiary Hearing

A.

As we have just noted, the Fifth Amendment issue in this case is before the Court on undisputed facts:

> No one ever told Smith that Dr. Grigson's examination concerned more than Smith's competence to stand trial. No one ever revealed that their ninety-minute interview would be used to gather the

> evidence that would send Smith to his death. These facts are undisputed. . .

602 F.2d at 703; CA. 18. At no time in the proceedings below has the State ever requested a hearing on these facts, or so much as suggested that one would be useful. And in its certiorari petition, the State limited its claim that a hearing should have been held to "the disputed surprise issue." Cert. Pet. at 4.

Having chosen to litigate the Fifth Amendment issue solely on the law in the courts below, the State may not claim for the first time at this late date that a hearing is required. *Whiteley* v. *Warden, supra,* 401 U.S. at 569. And having failed to ask for certiorari on that claim, the State may not raise the issue in this Court. Rule 40.1(d)(2).

B.

A district court is hardly required to conduct a hearing before ruling in every habeas corpus proceeding. The court may order the submission of affidavits by both sides as a means of narrowing the issues, to determine whether a hearing is necessary. 28 U.S.C.§ 2246; Rules Governing Section 2254 Cases in the United States District Courts, Rule 7; Wright, *Procedure for Habeas Corpus,* 77 F.R.D. 227, 244-45 (1978); see also *Harris* v. *Nelson,* 394 U.S. 286, 299 (1969). If the affidavits reveal no material disputes of fact, the court may rule as a matter of law without hearing live testimony. *Blackledge* v. *Allison,* 431 U.S. 63, 80-81 (1977); *Browder* v. *Director, Illinois Department of Corrections,* 434 U.S. 257,

266 n.10 (1978); *Walker* v. *Johnston,* 312 U.S. 275, 284 (1941).

In this case, the habeas corpus petition alleged that Dr. Grigson was left off of the prosecution's court-ordered witness list, that counsel for Mr. Smith did not know until approximately ten minutes before the doctor testified that he was to be a witness for the State, and that these circumstances violated Mr. Smith's constitutional rights. A. 72-73. The State's answer did not address this claim at all, other than to state that defense counsel was supplied with the doctor's report and was aware of the result of the examination. A. 95-96. And the state trial record gave the district court ample ground to conclude that Dr. Grigson had indeed been used as a surprise witness. That record reveals that the prosecutor discussed Dr. Grigson's findings with him in advance of trial, A. 14, 15, asked him to testify, A. 15-16, and, at least five days before the trial, told him approximately when he would be needed, A. 15; yet at no time did the prosecutor amend his court-ordered witness list to advise defense counsel of his intentions.

Nonetheless, in the exercise of caution, the district court sought to further clarify the facts by propounding several questions to be answered by affidavits from Mr. Smith's trial attorneys. These questions dealt with the circumstances surrounding Dr. Grigson's "appointment" by the state trial judge, and appear designed to probe whether any of those circumstances indicate that defense counsel knew or should have known that Dr. Grigson would be called by the prosecu-

tion to testify at the penalty trial on the issue of dangerousness. Counsel for the State was notified of these questions and was directed to prepare controverting affidavits "if she determines them appropriate." A. 108. Counsel for the State chose to file only one responsive affidavit, executed by the state trial judge. A. 117-19. At the district court's request, A. 142, an additional affidavit was filed by one of Mr. Smith's trial attorneys two months later. This time, counsel for the State did not respond at all.

Comparing the affidavits submitted by both sides, the district court found no need for a hearing on the question of Dr. Grigson's appearance as a surprise witness at respondent's trial. And with good reason: the affidavits did not reveal any genuine dispute of material facts necessitating such a hearing.

The affidavits are in total agreement that: (i) Mr. Smith's trial attorneys never raised any question as to his competence to stand trial or his sanity, A. 109-10, 113, 115, 118; (ii) the trial judge nonetheless had Dr. Grigson visit Mr. Smith for the sole purpose of satisfying the judge personally that respondent was competent to stand trial, A. 110, 113, 116, 117; (iii) this "appointment" was made by oral communication, and is not reflected by any court order or letter, A. 110, 112, 115, 118; (iv) Dr. Grigson did not prepare any written report of his findings, A. 110, 113, 116, 118; and (v) Dr. Grigson's letter to the trial judge summarizing his findings was not served upon defense counsel, but was merely placed in the court file by the judge, A. 110, 112-13, 116, 118.

One of Mr. Smith's attorneys repeated in his affidavits the unanswered allegation of the habeas corpus petition that he had no advance notice of the prosecution's intention to call Dr. Grigson at the penalty trial. A. 113, 121. This allegation was not disputed by the state trial judge. The State may argue that the trial judge alone was not in a position to refute it definitively. But that does not excuse the State's failure to produce any other controverting affidavits, as required by the district court. Had Dr. Grigson personally informed defense counsel of his impending appearance, an affidavit from the doctor could have been filed. And had the assistant district attorneys prosecuting Mr. Smith accorded defense counsel any advance notice of their intention to call the doctor, surely their affidavits could have been submitted.

In view of the substantial support in the state trial record for the claim that Dr. Grigson materialized at the eleventh hour as a surprise witness, it was the State's obligation to produce affidavits controverting that claim and establishing genuine issues of material facts. *Cf. Bros, Inc.* v. *W. E. Grace Manufacturing Co.*, 261 F.2d 428, 433 (5th Cir. 1958); *Golden Oil Co., Inc.* v. *Exxon Co., U.S.A.*, 543 F.2d 548, 551 (5th Cir. 1976); *Munoz* v. *International Alliance of Theatre Stage Employees, Etc.*, 563 F.2d 205, 213-214 (5th Cir. 1977); *Gossett* v. *Du-Ra-Kel Corp.*, 569 F.2d 869, 873 (5th Cir. 1978). For the State to rest solely upon the trial judge's affidavit — an affidavit that largely corroborated the submissions filed on behalf of Mr. Smith — was to proceed

at its own peril. Cf. *Whiteley* v. *Warden, supra,* 401 U.S. at 569.

The State now points to only one dispute of fact that it says is raised by the affidavits: whether the trial judge notified defense counsel of Dr. Grigson's appointment. Br. Pet. at 39. Both defense attorneys categorically state that they received no such notice. A. 109, 112, 115. The trial judge concedes that there was no order or letter reflecting the appointment, A. 118, let alone indication of service of any such document upon defense counsel. He further concedes that he merely placed Dr. Grigson's letter summarizing Dr. Grigson's findings in the court file, rather than sending a copy to defense counsel. *Ibid.* And the state trial record reflects that when defense counsel objected to the doctor's appearance, the trial judge did not allude to any prior notification of the appointment as a ground for overruling the objection, A. 16-17. *Cf. Blackledge* v. *Allison, supra,* 431 U.S. at 80 n.19. On this record, the trial judge's equivocal statement more than three-and-one-half years later that "[a]s best I recall" he notified defense counsel of the appointment, A. 118, is hardly sufficient to create a genuine dispute of fact. The state judge did not aver with any assurance that he had notified defense counsel. Both defense lawyers squarely averred that he had not, and everything else before the district court corroborates their assertion.

In any event, a dispute on this question alone would not be material to the disposition of the case. Even if defense counsel had been notified of the ap-

pointment, it is undisputed that the purpose of Dr. Grigson's court-ordered visit was merely to inquire into Mr. Smith's present competence to stand trial — not to assess his probable future dangerousness. A. 117. In the absence of notice that Dr. Grigson's examination would address the issue of future dangerousness, defense counsel would still have been justified in viewing the interview as irrelevant to the penalty trial. 602 F.2d at 699 n.5; CA. 9.

The record upon which the district court ruled did not reveal any genuine disputes as to material facts. Accordingly, the court of appeals was correct in holding that the district court committed no error by deciding the case on that record.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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